Supreme Court, U.S.
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No. ——

# In the Supreme Court of the United States

DIANE M. HENDRICKS AND
KENNETH A. HENDRICKS,

*Petitioners*,

v.

MUTUAL INDEMNITY (BERMUDA), LTD.,
a Bermuda corporation,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The Petitioners brought parallel preliminary injunctive proceedings in the Central District of California and the Eastern District of Michigan to enjoin draws on international letters of credit totaling $8,248,107.50 pending resolution of related fraud litigation. Those two proceedings involved the same parties, facts, legal issues, and arguments concerning injunctive relief authorized by substantively identical provisions of the Uniform Commercial Code as adopted by Michigan and California. Both district courts entered preliminary injunctions. Identical interlocutory appeals were heard by the Sixth and Ninth Circuits. The Circuits reached directly opposite conclusions on the same issues of federal procedure. The questions presented are:

1. Whether, under Federal Rule of Civil Procedure 65 and *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), the insolvency of a letter of credit beneficiary demonstrates sufficient irreparable harm to support a preliminary injunction against draws on a letter of credit.

2. Whether, under Federal Rule of Civil Procedure 65, the Sixth Circuit has authority to apply heightened injunctive standards that override a substantive right created by a state legislature, where the state statute does not articulate the heightened injunctive standard and the District Court applied the express provision of the statute in granting injunctive relief.

## PARTIES TO THE PROCEEDING

This Petition for Writ of Certiorari is brought on behalf of individuals, Diane M. Hendricks and Kenneth A. Hendricks. Respondent is Mutual Indemnity (Bermuda), Ltd., a Bermuda corporation. Comerica Bank was a party to proceedings below, but did not appeal the district court's ruling and thus was not a party to the appeal sought to be reviewed.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

As Petitioners are individuals, no corporate disclosure statement is required.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners, Diane M. Hendricks and Kenneth A. Hendricks, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is an unpublished opinion, which can be found at *Hendricks v. Comerica Bank N.A.*, 122 Fed. Appx. 820 (6th Cir. 2004), and *Hendricks v. Comerica Bank, N.A.*, 2004 WL 2940879 (6th Cir. Dec. 20, 2004). It will be cited in this Petition as 6th Cir. Op. Appx. B at __. The parallel opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Hendricks v. Bank of America, N.A.*, -- F.3d --, 2005 WL 1217391 (9th Cir. May 24, 2005), and will be cited in this Petition as 9th Cir. Op. Appx. F at __. The Ninth Circuit's May 24, 2005 opinion amended, upon denial of petition for rehearing *en banc*, that Court's opinion of February 25, 2005, which was reported at *Hendricks v. Bank of America, N.A.*, 398 F.3d 1165 (9th Cir. 2005), and is attached as Appx. G.

## JURISDICTION

The Sixth Circuit issued its opinion on December 20, 2004. On January 3, 2005, Petitioners herein petitioned the Sixth Circuit for rehearing, with a suggestion for rehearing *en banc*. The Sixth Circuit denied the petition for rehearing on March 10, 2005. (*See* Appx. A.) On March 16, 2005, Petitioners moved the Sixth Circuit to stay the mandate pending the resolution of this Petition for Writ of Certiorari. The Sixth Circuit granted the motion to stay the mandate on

April 14, 2005. (*See* Appx. C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 65 provides:

**(a) Preliminary Injunction.**

**(1)** *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

**(2)** *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

**(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or

damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall

proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) **Employer and Employee; Interpleader; Constitutional Cases.** These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C.,

§ 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

**(f) Copyright Impoundment**. This rule applies to copyright impoundment proceedings.

Fed. R. Civ. P. 65.

Section 1652 of United States Code Title 28 provides:

**State laws as rules of decision**
The laws of the several states, except where the Constitution or treaties of the United States or act of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

Section 440.5109 of the Michigan Uniform Commercial Code provides:

**Forged or Materially Fraudulent Documents; Honor Upon Presentation**

(1) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(a) The issuer shall honor the presentation, if honor is demanded by 1 or more of the following:

(i) A nominated person who has given value in good faith and without notice of forgery or material fraud.

(ii) A confirmer who has honored its confirmation in good faith.

(iii) A holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person.

(iv) An assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person.

(b) The issuer, acting in good faith, may honor or dishonor the presentation in any other cause.

(2) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds all of the following:

(a) The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer.

(b) A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted.

(c) All of the conditions to entitle a person to the relief under the law of this state have been met.

(d) On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (1)(a).

MICH. COMP. LAWS § 440.5109.

## STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit, which held that a finding of irreparable harm necessary to support a preliminary injunction against a fraudulent draw on a letter of credit can never be based upon evidence of the beneficiary's insolvency, even when the beneficiary's insolvency is uncontested. Petitioners suggest that review by this Court is appropriate because the Sixth Circuit's decision:

(a) is in conflict with the decisions of every other court of appeals to address the issue, including a decision from the Ninth Circuit on identical facts;

(b) ignores established precedent of this Court holding that insolvency generally can establish irreparable harm;

(c) effectively rewrote state law authorizing such injunctions, imposing a higher standard than that called for under the express language of the statute; and

(d) creates confusion in an important area of international commercial law that requires uniformity and consistency.

**A. Subject Matter Jurisdiction**

This suit, on petition from the Sixth Circuit, and the parallel Ninth Circuit case, were brought under the courts' diversity jurisdiction, 28 U.S.C. § 1332. The parties are completely diverse: Petitioners Diane and Kenneth Hendricks are Wisconsin citizens; Respondent Mutual Indemnity (Bermuda) Ltd. is a Bermuda corporation with its principal place of business in Bermuda.[1] The amount in controversy exceeds $75,000.

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[1] Judge O'Meara of the Eastern District of Michigan entered a preliminary injunction against defendant Comerica Bank, enjoining Comerica Bank from honoring certain letters of credit issued from its offices in Detroit, Michigan. (Appx. D at 18a.) Comerica Bank is a Michigan corporation with its principal place of business in Michigan. Comerica Bank did not appeal the district court's decision, and is not a Respondent to this Petition for Writ of Certiorari.

**B. Factual Background**

This case arises out of a fraud committed by Mutual Indemnity (Bermuda) Ltd. ("MIB") on Diane and Kenneth Hendricks (the "Hendricks"). For purposes of this proceeding - - and this petition - - that fraud remains uncontested. Details of the fraud can be found in the opinions of the Sixth and Ninth Circuits. (*See* 6th Cir. Op. Appx. B at 4a-6a; 9th Cir. Op. Appx. F at 44a-45a.) Only the core material facts will be discussed herein.

The Hendricks own and operate an insurance brokerage firm, American Patriot Insurance Agency, Inc. ("American Patriot"). (6th Cir. Op. Appx. B at 4a.) Under a "Rent-a-Captive" insurance program that American Patriot offered to roofing construction contractors, MIB and its related entities provided underwriting, claims handling, and reinsurance services for the policies. (*See* 6th Cir. Op. Appx. B at 4a-5a.) The complete details of this "Rent-a-Captive" program are not relevant to this petition, but by way of a general summary, MIB was responsible for reinsuring claims exceeding a certain amount, but American Patriot was required to indemnify MIB for those losses. (6th Cir. Op. Appx. B at 4a-5a.) The arrangement was subsequently amended to place the indemnification liability on the Hendricks personally, rather than on American Patriot. The Hendricks secured their obligation to indemnify MIB via letters of credit.

After the program had been in operation for approximately three years, it became apparent that MIB and its subsidiary and related companies were substantially under-reserving claims, leading to a shortfall between premiums taken in and claims owed. (*See* 9th Cir. Op. Appx. F at 44a.) The obligation for this shortfall relating to amounts in excess

of a specified level actually fell to MIB's sister company, Legion Insurance Company ("Legion"). (*See* 9th Cir. Op. Appx. F at 44a.) MIB's officers and executives, however, fraudulently represented to the Hendricks that the Hendricks were responsible for such amounts. (*See* 6th Cir. Op. Appx. B at 5a-6a; 9th Cir. Op. Appx. F at 44a.) This was part of a larger scheme to defraud the Hendricks, later exposed by a whistle-blower, and undisputed herein. To guard the Hendricks against this non-existent exposure, MIB offered to purchase reinsurance, if the Hendricks provided $1 million and posted several new letters of credit amounting to approximately $8.2 million for MIB's benefit. The Hendricks unwittingly agreed. (*See* 6th Cir. Op. Appx. B at 6a; 9th Cir. Op. Appx. F at 44a.)

### C. The District Court Litigation

MIB found itself in a state of rapid financial decline. As MIB's condition worsened, it demanded yet more letters of credit and cash from the Hendricks, and it threatened to draw down on the existing letters of credit. At this point, a former MIB executive stepped forward to blow the whistle on MIB's actions. (*See* 6th Cir. Op. Appx. B at 5a-6a; 9th Cir. Op. Appx. F at 44a.) The Hendricks immediately brought suit against MIB and its related entities in the Northern District of Illinois, alleging fraud, conspiracy, negligent misrepresentation, negligence, and violations of the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. § 1962.[2]

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[2] Judge Castillo of the Northern District of Illinois eventually dismissed the merits litigation pursuant to a Bermuda forum selection clause in the various program agreements, a decision that was affirmed by the Seventh Circuit. *American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt, Ltd.*, 364 F.3d 884 (7th Cir.

(*See* 9th Cir. Op. Appx. F at 27a.) The Hendricks concurrently sought injunctions from the Central District of California and the Eastern District of Michigan to prevent MIB from drawing down on letters of credit held by different banks in those respective districts until the merits litigation was concluded. (*See* Appx. D; Appx. E.) Both courts entered temporary restraining orders and ordered MIB to show cause why preliminary injunctions should not issue.

Judge King of the Central District of California was the first to hold a preliminary injunction hearing. MIB's arguments before Judge King were limited to jurisdiction and venue. MIB did not contest the Hendricks' evidence demonstrating that injunctive relief was appropriate. (*See* 9th Cir. Op. Appx. F at 44a-47a.) That undisputed evidence included evidence of MIB's fraud upon the Hendricks and evidence that MIB was *insolvent*. (*See* 9th Cir. Op. Appx. F at 44a-47a.) Judge King concluded that the court had jurisdiction to enjoin draws on the letters of credit, MIB's refusal to consent to jurisdiction and venue notwithstanding. (*See* 9th Cir. Op. Appx. F at 28a; *see also* Appx. E.) Judge King further ruled that the Hendricks were likely to succeed in establishing material fraud and *that they would suffer irreparable injury without an injunction because of MIB's financial circumstances*. (*See* 9th Cir Op. Appx. F at 46a.) Consequently, Judge King enjoined any draws on those letters of credit pending resolution of the fraud claims. (*See* Appx. E)

Judge O'Meara of the Eastern District of Michigan later held a similar preliminary injunction hearing. (*See* Appx. D.)

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2004). The merits litigation is currently being litigated in the Courts of Bermuda.

MIB presented the same written arguments on jurisdiction and venue, again not contesting the Hendricks' evidence and arguments on fraud and irreparable harm (including MIB's insolvency) pursuant to the substantive injunctive standards of Fed. R. Civ. P. 65.[3] Judge O'Meara subsequently issued a written ruling, granting the preliminary injunction "for the reasons stated on the record at the hearing held before this Court . . . and adopting as applicable to this matter the findings of fact and conclusions of law" contained in the transcript and ruling from the proceedings before Judge King. (*See* Appx. D at 18a.)

**D. The Appellate Litigation**

MIB appealed both preliminary injunction orders, to the Ninth and Sixth Circuits respectively. On appeal, MIB broadened the scope of its arguments to include, for the first time, a challenge to the substantive injunctive standards applied by the District Courts and the Hendricks' evidence demonstrating that injunctive relief was appropriate.

Both Circuit Courts reviewed the same facts and identical legal issues, yet reached opposite conclusions. The Ninth Circuit affirmed the injunction, finding that irreparable harm to the Hendricks was "virtually self-evident" from the evidence demonstrating MIB's insolvency. (*See* 9th Cir. Op. Appx. F at 45a.) The Sixth Circuit vacated the injunction, holding that the district court abused its discretion and improperly applied the law when it found irreparable harm resulting from MIB's insolvency. (*See* 6th Cir. Op. Appx. B at 9a.) Specifically, the Sixth Circuit held that, at least in the

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[3] At oral argument, MIB's counsel offered unsupported *argument* regarding the Hendricks' evidence.

context of letters of credit, "exceptional circumstances" must be present, and that the insolvency of a beneficiary of a letter of credit (and therefore *impossibility of recovery* in subsequent merits litigation) could never, as a matter of law, constitute irreparable harm supporting an injunction. (*See* 6th Cir. Op. Appx. B at 12a.)[4]

The Hendricks moved the Sixth Circuit to stay issuance of its mandate, on the basis that there was a reasonable possibility that four Justices of this Court would vote to grant Certiorari, and a fair possibility that the entire Court would reverse. The Sixth Circuit agreed, granting the motion and staying the mandate pending resolution of this Petition for Writ of Certiorari. (Appx. C.) On May 24, 2005, the Ninth Circuit amended its earlier opinion, and denied MIB's petition for rehearing with suggestion for rehearing en banc. (Appx. A.) The Ninth Circuit's decision is thus now final and subject to a Petition for Writ of Certiorari, if MIB so elects.

## REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted for four principal reasons. First, the Sixth Circuit's decision creates an irreconcilable conflict with decisions of several Circuits on the identical issue. With respect to the conflict between the Sixth and Ninth Circuits, this case presents a far more direct conflict than most matters that come before this

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[4] The Hendricks subsequently brought the Sixth Circuit's departure from precedent and resulting split of authority to the attention of the Sixth Circuit via a petition for rehearing with suggestion for rehearing *en banc*, which was denied. (Appx. A.)

Court – this is a case where the *very same* parties, facts, arguments, issues and records were submitted to two Circuit Courts of Appeals, which reached polar opposite conclusions.

Second, in reaching its conclusion that the element of irreparable harm necessary to support an injunction against letters of credit could never be established by the beneficiary's insolvency, the Sixth Circuit's decision departed from established precedent of this Court (and virtually every other Circuit), which uniformly stands for the proposition that irreparable harm can be established by evidence of insolvency. The Sixth Circuit not only failed to follow that precedent, it refused to even acknowledge its existence. That departure from overwhelming precedent, and failure to address this Court's relevant decisions to the contrary, also justifies review.

Third, in effectively creating a new rule in cases involving letters of credit, the Sixth Circuit violated fundamental principles of federalism when it used Federal Rule of Civil Procedure 65 to override a state-created right. In contravention of the injunctive standards called for by the Michigan statute, which are entirely consistent with the standards of Rule 65, the Sixth Circuit imposed heightened and unarticulated standards of "exceptional circumstances" and "irreparable harm" to vacate a proper injunction. The Sixth Circuit exceeded its authority in doing so, also justifying review by this Court.

Finally, review is appropriate because the Sixth Circuit's decision creates uncertainty in an area of law that requires uninterrupted uniformity, both temporally and geographically. Letters of credit are a widely used and essential tool of commerce both in the United States and abroad. Letter of credit law recognizes that fraudulently obtained letters are not

worthy of protection, and therefore authorizes injunctions against drawing on such letters upon a showing of fraud and the usual standards of injunctive relief, one of which is irreparable harm. *See* U.C.C. § 5-109; MICH. COMP. LAWS § 440.5109(2); CAL. COM. CODE § 5109. Unless this Court reasserts that the dissipation of assets rendering recovery impossible constitutes irreparable harm, letter of credit practitioners and litigants in the states within the Sixth Circuit will be treated in a manner irreconcilable with national precedent concerning the application of Federal Rule of Civil Procedure 65, including the Ninth Circuit's resolution of the parallel proceeding (*see* Appx. F at 45a-47a), and a similar (but unrelated) opinion of the Second Circuit, *Brenntag International Chemicals, Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999).

### A. There Exists An Irreconcilable Conflict Between The Circuits

The Sixth Circuit apparently accepted that MIB had defrauded the Hendricks, was likely insolvent and would be unable to satisfy a subsequent judgment. (*See* 6th Cir. Op. Appx. B at 12a.) Despite that, the Sixth Circuit vacated the injunction because it believed that the insolvency of a beneficiary can never demonstrate irreparable harm. (*See* 6th Cir. Op. Appx. B at 12a-13a.)

The Ninth Circuit came to the direct opposite conclusion. The Ninth Circuit agreed with the Hendricks that the risk of irreparable harm was "virtually self-evident" due to MIB's insolvency. (*See* 9th Cir. Op. Appx. F at 45a-46a.) The Ninth Circuit analyzed the ample and uncontested evidence demonstrating MIB's insolvency, finding:

> We hold, therefore, that the district court did not err by concluding that the Hendricks would face a significant threat of irreparable injury if a preliminary injunction did not issue to prevent the Bank from honoring [MIB's] draw. *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) ("[A] district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant. . . .").

(9th Cir. Op. Appx. F at 46a-47a.) Thus, the same evidence of insolvency was presented to two different courts of appeal, with one court holding that irreparable harm was "virtually self-evident" due to uncontradicted evidence of insolvency and the other holding that the district court *abused its discretion* in finding irreparable harm on the same evidence. Respectfully, what is self-evident in San Francisco cannot be an abuse of discretion in Cincinnati. *Cf. e.g. Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 1000 (7th Cir. 1996) (describing attorney sanctions imposed because differing decisions of judges in the same district court in nearly identical cases as a "spectacle" that "unseemly mock[ed] the efforts of the federal judiciary to reassure skeptics that we are trying with some success to achieve expedition and economy in the judicial process.")

Although the Ninth Circuit did suggest that it had not been directly called upon to decide whether a different standard of irreparable harm should apply in cases involving letters of credit, this does not eliminate the conflict between the decisions. The findings of fact and conclusions of law from Judge King and Judge O'Meara are for all practical purposes identical. Judge O'Meara adopted the same findings of fact and conclusions of law made by Judge King. Thereafter,

MIB raised the same arguments in both appeals, yielding different results, with the Ninth Circuit finding irreparable harm to be self-evident based on the evidence of MIB's insolvency. It is impossible to conclude that the decisions are not in conflict with one another.

The Sixth Circuit's opinion is also in conflict with the Second Circuit's opinion in *Brenntag International Chemicals, Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999). *Brenntag* is consistent with the Ninth Circuit's view. Like the Ninth Circuit, the Second Circuit in *Brenntag* found that the insolvency of the beneficiary of a letter of credit demonstrated sufficient irreparable harm to warrant an injunction. *Brenntag*, 175 F.3d at 249-50.

The Fifth Circuit's decision in *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985), which was inexplicably cited by the Sixth Circuit in this case to support its conclusion, further demonstrates the split created by the Sixth Circuit. *Enterprise* accepts the prevailing view, i.e., that insolvency will demonstrate irreparable harm:

> [The] possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. *The absence of an available remedy by which the movant can later recover monetary damages, however, may also be sufficient to show irreparable injury.*

*Enterprise*, 762 F.2d at 472-73 (emphasis added, internal quote marks, brackets and citations omitted). This quotation is *dicta* because the *Enterprise* court was not faced with deciding whether insolvency could demonstrate irreparable

harm. Instead, *Enterprise* analyzed and rejected irreparable harm allegations based on the timing of a letter of credit draw and the forum in which the litigation should take place. *See Enterprise*, 762 F.2d at 474. But *Enterprise* clearly agrees with the national standard on the critical point that insolvency can demonstrate irreparable harm. *Enterprise*, 762 F.2d at 472-73. Simply put, *Enterprise* does not support the Sixth Circuit's incorrect conclusion that insolvency ("no money") does not equate to "no remedy."

Accordingly, there is an undeniable split among the circuits on one issue of federal procedural law: Whether under Federal Rule of Civil Procedure 65 the insolvency of a letter of credit beneficiary can demonstrate sufficient irreparable harm to warrant an injunction against fraudulent draws on a letter of credit. It bears emphasis that this split is on a federal issue – the application of federal injunctive standards to a state-created remedy. The federal courts have been nearly uniform in their application of Fed. R. Civ. P. 65 in diversity cases, holding that it is a procedural rule governed by federal standards. *See e.g. Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 101-02 (6th Cir. 1991) (analyzing Rule 65 under the concerns of *Erie Ry. Co. v. Tompkins*); *see also In re Irrevocable Standby Letter of Credit No. SE444393W*, 336 F. Supp.2d 578, 581 (M.D.N.C. 2004) (applying Rule 65 to a motion to enjoin a draw on a letter of credit). This Court is the only body that can reconcile the split created by the Sixth Circuit and should do so in this case.

### B. The Sixth Circuit Refused To Follow Precedent Of This Court And Uniform National Precedent

The Sixth Circuit's departure from established precedent also justifies a Writ of Certiorari. To appreciate the extent to which the Sixth Circuit's decision departs from established law, it is important to again point out what is not at issue – MIB's insolvency. The Sixth Circuit drew no distinction between likely insolvency and certain insolvency, explaining that whether MIB "is or will become bankrupt and will not be able to satisfy a judgment" could not constitute irreparable harm, as a matter of law. (*See* 6th Cir. Op. Appx. B at 12a.) This holding is unique in American jurisprudence.

In the context of preliminary injunctions, the law of this Court and the Circuits is uniform: An obligor's insolvency can and does demonstrate irreparable harm sufficient to warrant a preliminary injunction against dissipation of assets pending resolution of litigation. In *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), this Court held that a preliminary injunction was authorized to maintain the status quo where the defendant was likely to be insolvent at the time of judgment, finding that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill." *Deckert*, 311 U.S. at 290. The *Deckert* Court concluded that the *legal* remedy against the defendant would be inadequate due to allegations the defendant was insolvent and the danger of dissipation of assets. *Id.* 311 U.S. at 290; *see also United States v. First National City Bank*, 379 U.S. 378, 385 (1965) (upholding a preliminary injunction freezing assets in a suit seeking payment of back taxes).

Every other Circuit that has addressed the issue is in accord. *See Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43, 52-

53 (1st Cir. 1986) (enjoining the disposition of assets where there was danger the defendant would be insolvent prior to judgment); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) (injunction appropriate when the defendant intended to frustrate any judgment by transferring assets out of the jurisdiction); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (imminent bankruptcy gutted the sufficiency of money damages as a remedy); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205-06 (3d Cir. 1990) (preliminary injunction authorized because of a possibility the defendant would be insolvent at the time of judgment); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330-32 (4th Cir. 1989) (preliminary injunction preventing dissipation of assets permitted where plaintiffs alleged the defendant was insolvent and assets were in danger of dissipation); *see also Federal Savings & Loan Ins. Corp. v. Dixon,* 835 F.2d 554, 560, n. 1 (5th Cir. 1987); *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 386 (7th Cir. 1984); *Airline Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987); *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). The authority in this regard is overwhelming. Courts regularly freeze assets pending an adjudication on the merits. The Sixth Circuit not only ignored this precedent, it failed to even acknowledge its existence.

The only distinguishing factor between this case and those listed above is that this case involves an injunction against a letter of credit. But, as discussed at the outset, the Second and Ninth Circuits have found no reason to depart from the general rule in letter of credit cases. Both *Brenntag* and the Ninth Circuit's parallel ruling found that the insolvency of a letter of credit beneficiary was sufficient to find irreparable harm. (*See* 9th Cir. Op. Appx. F at 45a-47a); *Brenntag*, 175

F.3d at 249-250. Moreover, as discussed *infra*, such a departure is not contemplated by the applicable state statute.

Accordingly, the Sixth Circuit's departure from precedent also justifies review by this Court. If the law on such an important issue is going to be changed, it should only be changed after review by this Court.

### C. The Sixth Circuit Exceeded Its Authority By Overriding The Michigan Statute

The fundamental principles of federalism and comity that are embodied in the *Erie* doctrine require federal courts sitting in diversity to follow and apply state substantive law, and it is axiomatic that federal courts are without power to change the substance of state law. 28 U.S.C. § 1652; *see also Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 106-09 (1945). In this case, the Sixth Circuit violated this principle by injecting new and higher standards of injunctive relief into an enactment of the Michigan legislature. The Sixth Circuit's action is particularly troubling because the statute at issue is narrowly tailored to address the specific issue at hand – *enjoining a letter of credit draw that would facilitate a material fraud.*

Michigan Uniform Commercial Code § 440.5109 provides an injunctive right upon a showing of fraud and the usual elements of injunctive relief. The relevant language states:

> (2) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a

> presentation or grant similar relief against the issuer or other persons only if the court finds all of the following:
>
> * * *
>
> (c) *All of the conditions to entitle a person to the relief under the law of this state have been met.*
>
> (d) *On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud* and the person demanding honor does not qualify for protection under subsection (1)(a).

MICH. COMP. LAWS § 440.5109(2)(c) (emphasis added). Apart from the required showing of fraud, the elements necessary to obtain relief are *no higher than any other injunction*. *See id.*; *see also* U.C.C. § 5-109 Official Comments 1, 4 (2002); *Southern Energy Home, Inc. v. AmSouth Bank of Alabama*, 709 So.2d 1180, 1187 (Ala. 1998) (holding that "[t]here is nothing in the letter of credit law to suggest that a plaintiff seeking an injunction should not have to satisfy the *traditional rules for the extraordinary relief*") (emphasis added, quoting John Dolan, THE LAW OF LETTER OF CREDIT: COMMERCIAL AND STAND-BY CREDITS § 7.04[1] (rev. ed. 1996)).

Despite this, the Sixth Circuit was decisive in *not* deferring to the "traditional rules for extraordinary relief" or the "elements necessary for any other injunction," or even the Michigan statute. There is no basis on which a federal court can impose an injunctive standard higher than that called for by Federal Rule of Civil Procedure 65, and higher than that

called for by the Michigan legislature. *Guaranty Trust*, 326 U.S. at 106-09. Yet, that is precisely what the Sixth Circuit did, finding that "[i]n the context of an international letter of credit, there are particular concerns that make the issuance of a preliminary injunction *even more extraordinary*, and which accordingly require a *clearer demonstration of exceptional circumstances*." (6th Cir. Op. Appx. B at 10a (emphasis added).)

This holding is *ultra vires*. Given that § 440.5109 is by its terms *limited to letter of credit cases*, the Michigan legislature already considered the particular concerns attendant to letter of credit injunctions, and decided against heightened injunctive standards. The Michigan legislature adopted § 440.5109 to address the narrow issue confronted by the Hendricks. In doing so, it did not choose to legislate that the injunctive right created by § 440.5109 is "even more extraordinary" than the usual injunction, or that the movant must make a "clearer demonstration of exceptional circumstances." Instead, the already high burden imposed is a showing of fraud and the usual standards of injunctive relief. MICH. COMP. LAWS § 440.5109(2)(c). It offends fundamental principles of federalism for a federal court to override a state statute in this manner. If § 440.5109 is to be re-written, it is within the province of the Michigan legislature, not the Sixth Circuit, to do so.

In considering this issue, it is important to note that the Sixth Circuit's decision cannot be reconciled along the traditional *Erie* lines of substance versus procedure. As noted, Fed. R. Civ. P. 65 is a procedural rule, *see Southern Milk Sales*, 924 F.2d at 101-02, and is not in conflict with Michigan injunctive standards. The general standards under both Fed. R. Civ. P. 65 and Michigan law are likelihood of success on the merits, irreparable harm, inadequate remedy

at law, and balancing of hardships. *See, e.g., Kernen v. Homestead Dev. Co.*, 591 N.W.2d 369, 372 (Mich. Ct. App. 1999); *Christian Schmidt Brewing Co. v. Heileman Brewing Co., Inc.*, 753 F.2d 1354, 1356 (6th Cir. 1985). Instead of applying Fed. R. Civ. P. 65, the Sixth Circuit *altered* substantive Michigan law by substituting its view of what letter of credit injunction law should be for the one adopted by the people of Michigan. That was beyond the court's authority. *See Guaranty Trust*, 326 U.S. at 106-09.

### D. This Case Presents An Important Issue, The Outcome Of Which Will Have A Significant Impact On International Commerce

Review by this Court is also appropriate because the issue presented is one of great importance to businesses engaged in international commerce. Letter of credit use has exploded since the 1950's, when paper letters of credit were primarily a tool to facilitate the sale of goods. Today, innumerable, widely-varied transactions are secured via paper and other media-based letters of credit. *See* Dellas W. Lee, Letters of Credit: What Does Revised Article 5 Have To Offer To Issuers, Applicants, and Beneficiaries?, 101 Com. L.J. 234, 234-35 (Fall, 1996). The ubiquity of letters of credit requires that there be uniformity and certainty in the governing law. *See* U.C.C. Art. 5 Prefatory Note. The U.C.C. drafters highlighted the need for uniformity in letter of credit law with the latest revision to Article 5 in 1995:

> Letters of Credit are a major instrument in international trade, as well as domestic transactions. To facilitate its usefulness and competitiveness, it is essential that U.S. law be in harmony with international rules and practices, as well as flexible enough to accommodate changes in technology and

> practices that have, and are, evolving. Not only should the rules be consistent within the Unites States, but they need to be substantively and procedurally consistent with international practices.

U.C.C. Art. 5 Prefatory Note.

The cornerstone of letter of credit law is the "independence principle," by which a letter of credit is said to be independent of the underlying transaction. This independence preserves confidence in letters of credit by assuring that payment is secure. But such confidence is materially undermined by fraud, a problem that has been recognized by the U.C.C. drafters and commenting scholars. *See e.g.* Michael Stern, The Independence Rule In Standby Letters of Credit, 52 U. Chi. L. Rev. 218, 233-46 (comment, Winter 1985). The drafters therefore found it necessary to craft a fraud-based exception to the independence principle that would preserve and enhance confidence in letters of credit. The 1995 revisions to Article 5 embodied in § 5-109 address this problem.

Specifically, Section 5-109 provides injunctive relief as an interim remedy to guard against fraud, but limits that relief to cases where the party seeking relief demonstrates through competent evidence that it is more likely than not to ultimately succeed on its claim of forgery or material fraud. *See* U.C.C. § 5-109 (b)(4); *see also* U.C.C. § 5-109 cmt 1; *Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1272-73 (1st Cir. 1990) (describing the level of fraud necessary to enjoin a letter of credit draw). This is a narrow exception to the independence principle that preserves independence yet engenders confidence that fraud will not be tolerated. Accordingly, § 5-109 accomplishes its goals by

imposing a high burden of evidence on the critical element of fraud. *See* U.C.C. § 5-109 cmt 4.

The Sixth Circuit's decision ignores this fact, throwing this area of the law into confusion. Contrary to the Sixth Circuit's belief, § 5-109's check on improper injunctions is *not* a heightened irreparable harm standard. Upon a more-likely-than-not showing of material fraud, and irreparable harm obviously occasioned by the letter of credit beneficiary's insolvency, a District Court (even in the Sixth Circuit) should be able to issue an injunction. The Sixth Circuit's decision upsets the intention of § 5-109 and throws uncertainty and confusion into an area where it cannot be tolerated. Commerce requires that the same rules apply to all letters of credit without regard to the fortuity of a given court's geographic location. This Court should clarify the law in that regard to prevent such uncertainty.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: June 6, 2005

Respectfully Submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-1952**

**[Filed, March 10, 2005]**

DIANE M. HENDRICKS, ET Al., )
Plaintiffs-Appellees, )
)
v. )
)
COMERICA BANK, )
a National Banking Corporation, )
et al., )
Defendants, )
)
MUTUAL INDEMNITY )
(BERMUDA), LTD., )
a Bermuda Corporation, )
Defendant-Appellant. )

Before: Siler, Batchelder, and Rogers, Circuit Judges

### ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-1952**

**[Filed, December 20, 2004]**

| | |
|---|---|
| DIANE M. HENDRICKS; KENNETH A. HENDRICKS, Plaintiffs-Appellees, | ) |
| v. | ) |
| COMERICA BANK, a National Banking Corporation; BANK OF AMERICA, N.A., a National Banking Corporation; Defendants, | ) |
| MUTUAL INDEMNITY (BERMUDA), LTD., a Bermuda Corporation, Defendant-Appellant. | ) |

On Appeal From
the United States District Court
for the Eastern District of Michigan

Before: Siler, Batchelder, and Rogers, Circuit Judges

## OPINION

**Rogers, Circuit Judge.** Mutual Indemnity (Bermuda), Ltd. appeals from the district court's grant of a preliminary injunction which prevents Comerica Bank from honoring Mutual Indemnity's draws against letters of credit ("LOCs") obtained by plaintiffs Diane and Kenneth Hendricks. Because the plaintiffs failed as a matter of law to show irreparable harm, we vacate the preliminary injunction.

### I.

In 1997, Diane and Kenneth Hendricks, owners of American Patriot Insurance Agency, set up the Roofers' Advantage Program, through which American Patriot could provide general liability, worker's compensation, and automobile liability insurance to roofing contractors through a single policy. The Roofers' Advantage policies were underwritten by a "Rent-A-Captive" program. In this case, American Patriot's program was totally underwritten by Legion Insurance Company. The complete details of this rent-a-captive scheme are not relevant to this appeal, but, by way of a general summary, Legion would receive the premiums, retain 10% for itself and transfer the remaining 90% to Mutual Indemnity. From the retained 10%, Legion would pay claims and expenses from the given year until that amount was exhausted. Mutual Indemnity was responsible for reinsuring claims exceeding this amount, but American Patriot was required to indemnify Mutual Indemnity for any losses exceeding the premium it received. The agreement was subsequently amended to place the indemnification liability on the Hendrickses personally, rather than on the company. The Hendrickses secured their obligation to indemnify Mutual

Indemnity with irrevocable letters of credit. Legion obtained non-captive reinsurance for losses that exceeded the total premium generated.

Roofers' Advantage never turned a profit, however, and suffered massive losses. Cunningham-Lindsey, the company Legion retained to handle its claims, apparently had under-reserved the claims. The Hendrickses anticipated that Cunningham-Linsdey's claims handling problems would cause Legion to increase the premiums and make it more difficult to underwrite policies. Because of these difficulties, Diane Hendricks met with the insurance companies to discuss whether it was appropriate to renew the program for another year.

Mrs. Hendricks and Lysa Saran, at the time chief operating officer of American Patriot, met with Eric Bossard, at the time a vice president at Legion, and James Agnew, a vice president at Commonwealth Risk, to discuss the future of the program. Mrs. Hendricks was particularly interested in her and her husband's potential liability for continued losses beyond the maximum Mutual Indemnity would pay in reinsurance. Bossard and Agnew indicated that they were unsure but that they would find out.

According to Bossard, he and Agnew met with officers of the affiliated insurance companies to discuss whether and to what degree the Hendrickses were personally liable for losses above Mutual Indemnity's limit. Bossard explains that, on learning that Legion -- and not the Hendrickses - were responsible for those losses, Glenn Partridge, Executive Vice President of Legion, and Richard Turner, President of Commonwealth Risk, instructed Bossard and Agnew to tell the Hendrickses that they actually were personally liable for those losses. Bossard was instructed to tell the Hendrickses

that in exchange for payment, Legion or Mutual Indemnity could obtain additional reinsurance to cap the Hendricks' potential liability. Thus, under Bossard's account, Legion and Mutual Indemnity were asking the Hendrickses to pay for additional insurance to cover losses that were not the responsibility of the Hendrickses, but rather were the responsibility of Legion. The Hendrickses agreed to pay Mutual Indemnity $1,000,000 for the additional reinsurance based on Bossard's statement.

The primary document setting out the terms of the parties' obligations was the Shareholder Agreement, between Mutual Indemnity Holdings (Bermuda), Ltd., an entity related to Mutual Indemnity, and American Patriot. This agreement contains a forum -- selection clause stating that "this Agreement has been made and executed in Bermuda and shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this Agreement shall be resolved exclusively by the courts of Bermuda." The Hendrickses, however, claiming fraud, instituted an action in the Northern District of Illinois against Mutual Indemnity and other related entities. Simultaneously, the Hendrickses filed actions in the Eastern District of Michigan and the Central District of California in which they sought to enjoin the banks which held the letters of credit from honoring any attempts by Mutual Indemnity to draw on the LOCs. In Michigan and California the Hendrickses sought only injunctions; they did not sue Mutual Indemnity for fraud in those venues. The Central District of California and the Eastern District of Michigan quickly issued temporary restraining orders ("TRO") and ordered the parties to appear at preliminary injunction hearings.

The parties attempted to settle the case and Mutual Indemnity allowed the Hendrickses to audit the rent-a-captive

program, but after eight months of talks, the settlement negotiations broke down. Once the negotiations ended, Mutual Indemnity sued the Hendrickses in Bermuda and moved to dismiss the three American lawsuits on jurisdictional and venue-based grounds. Acting first, Judge Ruben Castillo of the Northern District of Illinois dismissed the lawsuit in that district, holding that the forum-selection clause in the shareholder agreement required the Hendrickses to pursue their claims against Mutual Indemnity in Bermuda. Judge Castillo noted that the Hendrickses never argued that they were fraudulently induced into accepting the forum-selection clause or that the clause was the product of unequal bargaining power, but that the Hendrickses simply argued that they would be denied their day in court if forced to litigate in Bermuda because Bermuda's bankruptcy laws were favorable to Mutual Indemnity. Judge Castillo explained that he was "unconvinced that Plaintiffs have no recourse against the Scheme [of Bankruptcy] in its present form such that they will be unable to litigate their claims in Bermuda and thus be deprived of their day in court if we enforce the forum selection clause."

A little less than two months later, however, Judge George King of the Central District of California granted the Hendrickses' request for a preliminary injunction. Without reaching the issue of whether the court had personal jurisdiction over Mutual Indemnity or whether venue was proper, Judge King concluded that he did have jurisdiction to enjoin the Bank of America from honoring draws against the letters of credit. Judge King further explained that the Hendrickses were likely to succeed in establishing material fraud and that they would suffer irreparable injury without an injunction because of Mutual Indemnity's "questionable financial circumstances."

Judge John O'Meara of the Eastern District of Michigan considered the Hendrickses' request for a preliminary injunction last. Judge O'Meara heard oral argument on the motion, and indicated that he was inclined to follow Judge King's ruling, but did not state any conclusions of law on the record and did not make a ruling on the motion. Nearly a month later, Judge O'Meara issued a written ruling, granting the preliminary injunction "for the reasons stated on the record at the hearing held before this Court . . . and adopting as applicable to this matter the findings of fact and conclusions of law" contained in the transcript and ruling in the California case. In addition, Judge O'Meara ordered that the injunction would be dissolved if the plaintiffs either failed to prosecute their Seventh Circuit appeal diligently, or, in the event of an unsuccessful appeal, failed to commence an action in Bermuda within thirty (30) days on the same claims as the original Illinois action. On April 16, 2004, the Seventh Circuit affirmed the decision of Judge Castillo of the Northern District of Illinois dismissing the plaintiffs' case with regard to Mutual Indemnity, among others. On May 13, 2004, the Seventh Circuit denied the plaintiffs' petitions for rehearing and rehearing *en banc*. On June 16, 2004, the Hendrickses instituted an action against Mutual Indemnity and other related entities in Bermuda.

## II.

We determine that Mutual Indemnity has standing to appeal the injunction issued by Judge O'Meara against Comerica Bank, even though Mutual Indemnity was not itself enjoined. The Supreme Court has held that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988). Although Mutual Indemnity was not enjoined, it is a named defendant in this

action. Furthermore, the injunction is clearly an adverse judgment, because it prevents Comerica from honoring Mutual Indemnity's draw against the letter of credit, and thus deprives Mutual Indemnity of access to the funds. "'Standing to appeal is recognized if the appellant can show an adverse effect of the judgment, and denied if no adverse effect can be shown.'" *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 403 (6th Cir. 2001) (quoting 15A Charles A. Wright et al., Federal Practice and Procedure: § 3902 (2d ed. 1992)). The Hendrickses contend that just as certain nonparties may not appeal unless they have intervened, *see, e.g., Wilkenson v. Hercules Engines, Inc.*, 138 F.3d 608, 611 (6th Cir. 1998), named parties who contest personal jurisdiction should not be permitted to appeal. The Hendrickses have not, however, provided any authority for denying standing to a *named* party. Accordingly, Mutual Indemnity has standing to appeal, and we proceed to consider the issuance of the injunction.

Turning to the merits of the appeal, we conclude that the preliminary injunction must be reversed for failure of the plaintiffs to demonstrate irreparable injury. This court reviews a lower court's decision to grant a preliminary injunction for abuse of discretion. *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717 (6th Cir. 2003). Abuse of discretion can be found when the district court "improperly applies the governing law, or uses an erroneous legal standard." *Id.*

There are four factors to be considered when issuing a preliminary injunction:

> (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause

> substantial harm to others; and (4) whether the public interest would be served by issuing the injunction.

*Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The factor at issue here is irreparable harm. Judge King, and therefore through adoption Judge O'Meara, held that "there is also certainly a possibility of irreparable injury inasmuch as once released, the money is likely as alleged to be dissipated in light of the questionable financial circumstances of the Mutual entity." The district court improperly issued a preliminary injunction preventing Comerica from honoring Mutual Indemnity's draw on the letter of credit, because, in the context of international letters of credit, the Hendrickses as a matter of law have not shown irreparable harm.

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet*, 305 F.3d at 573. In the context of an international letter of credit, there are particular concerns that make the issuance of a preliminary injunction even more extraordinary, and which accordingly require a clearer demonstration of exceptional circumstances. Although this court has not fully addressed the interplay between preliminary injunctions and international letters of credit, several other circuits have usefully laid out the relevant considerations. In particular, the approach of the Fifth Circuit in *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985), has been widely adopted. *See, e.g., Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 956 (9th Cir. 1987); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34, 37 (1st Cir. 1986); *Fluor Daniel Argentina, Inc. v. ANZ Bank*, 13 F. Supp. 2d 562, 565

(S.D.N.Y. 1998). *In Enterprise International*, the Fifth Circuit first discussed the general principle that an injury is not "irreparable" unless "it cannot be undone through monetary remedies." 762 F.2d at 472 (internal quotation omitted). The court noted that this principle results in courts' refusing to enjoin the honoring of international letters of credit, because monetary loss is the only alleged harm. *See id.* at 473. The exceptions, the court noted, occurred in cases in which it was clear that the moving party would have no legal remedies at all, such as in cases involving litigation in Iran immediately following the 1979 revolution and the taking of American hostages. *Id.* The fact that the prospect of relief in a foreign court is speculative is not enough to constitute a showing of irreparable harm. *Id.*

The Fifth Circuit went on to explain that

> this reluctance to grant preliminary injunctive relief in international letter of credit cases is well founded in policy and business practice as well as in equity. The obligations created by a letter of credit are completely separate from the underlying transaction, with absolutely no consequence given the underlying transaction unless the credit expressly incorporates its terms. This principle of independence provides the letter of credit with one of its peculiar values, assurance of payment, and makes it a unique device developed to meet the specific demands of the market place. . . . These features of letters of credit are of particular importance in international transactions, in which sophisticated investors knowingly undertake such risks as political upheaval or contractual breach in return for the benefits to be reaped from international trade. . . . Thus, in this context, the requirements for preliminary injunctive relief,

> including the showing of a substantial threat of irreparable injury if the injunction is not issued, are to be strictly exacted so as to avoid shifting the contractual allocation both of the risk of loss and the burden of pursuing international litigation.

*Id.* at 473-74 (internal quotations and citations omitted).

In the instant case, the only injury that the Hendrickses have alleged is monetary. Therefore, absent exceptional circumstances, their alleged injury is not "irreparable." And any such exceptional circumstances must overcome the policies disfavoring the issuance of injunctions in cases involving international letters of credit. The Hendrickses argue that they have met this burden by presenting evidence that Mutual Indemnity is insolvent, and that various related entities are also insolvent, which they primarily demonstrate through the introduction of the rehabilitation proceedings for Legion Insurance, a related entity. Without more, this does not constitute extraordinary circumstances. Indeed, other courts have denied injunctions in cases in which it was unlikely that any foreign court could hear the underlying claim, a much more dire situation. *See Trans Meridian Trading Inc.*, 829 F.2d at 956 ("Where foreign courts provide even a potential legal remedy, injunctions are rarely issued. . . ."); *Enterprise Int'l, Inc.*, 762 F.2d at 473 ("When it has been shown . . . at worst, that access to foreign courts is speculative, injunctive relief has been refused."). Here, the chance that Mutual Indemnity is or will become bankrupt and will not be able to satisfy a judgment obtained against it presents less threat of irreparable harm than the chance that there will not even be a proceeding available in which to obtain that judgment. *See ANZ Bank*, 13 F. Supp. 2d at 564-65. In addition, the Hendrickses have not argued that they can never achieve a remedy in Bermuda courts. Because the

Hendrickses have not demonstrated that their potential monetary injury constitutes an exceptional circumstance, they are not entitled to an injunction preventing Comerica Bank from honoring Mutual Indemnity's draws on the letter of credit. The district court's conclusion that an injunction could be based on a finding that "the money is likely as alleged to be dissipated in light of the questionable financial circumstances of the Mutual entity" was therefore an improper application of governing law.

Nor are the Hendrickses' remaining arguments persuasive. They argue that an injunction was appropriate because Mutual Indemnity has not demonstrated the validity of its claim to the funds. This argument ignores the very nature of a letter of credit-it guarantees payment apart from the merits of the underlying disputes. *See Enterprise Int'l, Inc.*, 762 F.2d at 474. The Hendrickses are free to litigate the merits of their fraud claim in Bermuda, but those merits are not relevant to the question before this court.

## III.

Because the district court erred in granting an injunction due to the lack of a showing of irreparable harm, we do not need to reach the numerous other arguments advanced by both parties. Accordingly, the preliminary injunction is VACATED.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-1952**

**[Filed April 14, 2005]**

| | |
|---|---|
| Diane M. Hendricks; Kenneth A. Hendricks, | ) |
| Plaintiffs-Appellees | ) |
| | ) |
| v. | ) |
| | ) |
| Comerica Bank, a National Banking Corporation; Bank of America, N.A., a National Banking Corporation, | ) |
| | ) |
| Defendants | ) |
| | ) |
| Mutual Indemnity (Bermuda), Ltd., a Bermuda Corporation | ) |
| Defendant-Appellant | ) |
| | ) |

BEFORE: Siler, Batchelder, and Rogers; Circuit Judges

## ORDER

The appellee has filed a motion to stay the mandate. The appellant has filed a response in opposition and the appellee has filed a reply.

Upon consideration, it is ORDERED that the mandate be stayed to allow the appellee time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

**ENTERED BY ORDER OF THE COURT**

/s/_____
Leonard Green, Clerk

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No: 02-71477**

**[Filed June 18, 2003]**

| | |
|---|---|
| Diane M. Hendricks and | ) |
| Kenneth A. Hendricks, | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| Comerica Bank, a National Banking Corporation, | ) |
| Bank of America, N.A., a National Banking | ) |
| Corporation; and Mutual Indemnity | ) |
| (Bermunda), Ltd., a Bermuda Corporation | ) |
| Defendants. | ) |
| | ) |

Hon. John Corbett O'Meara

**PRELIMINARY INJUNCTION ORDER**

**THIS MATTER** having come before the Court for hearing at 2:00 p.m. on May 21, 2003 on Plaintiffs' Complaint for Injunctive Relief, Plaintiffs' Ex Parte

Application for Temporary Restraining Order and Preliminary Injunction and Defendant Mutual Indemnity (Bermuda) Ltd.'s Motion to Dissolve Temporary Restraints subsequent to this Court's entry of its Temporary Restraining Order on April 17, 2002 at 11:17 a.m., and continued in effect thereafter by stipulation of the parties:

**HAVING REVIEWED AND CONSIDERED** the following: Plaintiffs' Complaint for Injunctive Relief; Plaintiffs' Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction; Plaintiffs' Memorandum of Points and Authorities in Support of Their Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction; Defendant Mutual Indemnity (Bermuda), Ltd.'s ("MIB") Motion to Dissolve Temporary Restraints and Memorandum of Points and Authorities in Support of same; Plaintiffs' Memorandum of Points and Authorities in Opposition to the Motion to Dissolve Temporary Restraints; and Exhibits A-R Thereto; MIB's Reply and Supplemental Reply in Support of its Motion to Dissolve (attaching the February 27, 2003 ruling by Judge Castillo of the United States District Court for the Northern District of Illinois); the Joint Brief and Supporting Joint Exhibits submitted by the parties in *Diane M. Hendricks and Kenneth A. Hendricks v. Bank of America, et al*, Case No. 02-CV-3150 GHK (CWX), pending in the United States District Court for the Central District of California, the Honorable George H. King presiding ("California Action"); the Transcript of Proceedings conducted before Judge King in the California Action on April 14, 2003 (the "California Preliminary Injunction Transcript"); and the Preliminary Injunction Order entered by Judge King in the California Action on April 22, 2003; and

**HAVING HEARD ORAL ARGUMENT OF THE PARTIES** in open court on May 21, 2003;

**NOW, THEREFORE**, for the reasons stated on the record at the hearing held before this Court on May 21, 2003 and adopting as applicable to this matter the findings of fact and conclusions of law contained in the California Preliminary Injunction Transcript, as well as the other determinations rendered by Judge King in the California Action as reflected in the California Preliminary Injunction Transcript, the Court hereby enters the following Preliminary Injunction pursuant to Michigan Complied Laws Annot. 440.5109(2)(a)-(d) and Fed.R.Civ.P.65:

**IT IS ORDERED** that Defendant, Comerica Bank, its officers, employees, agents, servants, attorneys and all persons in active concert with it, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined from:

(a) Accepting, acting upon, facilitating or in any manner allowing any draw down on the following letters of credit issued by Comerica Bank in the respective amounts and bearing the respective Reference Numbers set forth below (collectively, the "LOCs"):

> Letter of Credit No. 563890-03 in the amount of $4,226,000.00;
>
> Letter of Credit No. 563893-03 in the amount of $500,000.00;
>
> Letter of Credit No. 563889-03 in the amount of $450,000.00;and

(b) Transferring, conveying, assigning, amending, or otherwise hypothecating any interest in or

to the LOCs pending further order of this Court.

**IT IS FURTHER ORDERED THAT** Comerica Bank shall not cancel any of the LOCs while this Preliminary Injunction remains in effect and shall affirmatively take any and all action necessary to maintain the LOCs in force pending further order of this Court;

**IT IS FURTHER ORDERED** that this Court's April 17, 2002 Temporary Restraining Order is hereby dissolved solely with respect to Comerica Bank Letter of Credit No. 563894-03 issued in the amount of $682,5000.00 and that no provision within this Preliminary Injunction Order enjoins Comerica Bank Letter of Credit No. 563894-03 in any manner.

**IT IS FURTHER ORDERED** that this Preliminary Injunction shall remain in effect until the earlier of the following:

(1) Final resolution of the merits of the underlying claims between Plaintiffs and the Mutual Defendants (as defined in the Illinois Action) in either the Illinois federal court or Bermuda; or

(2) June 18, 2006.

**IT IS FURTHER ORDERED** that this Preliminary Injunction is conditioned upon Plaintiffs' timely posting with the Clerk of this Court an undertaking in the form of a bond in the amount of $178,572.00 (One Hundred Seventy Eight Thousand Five Hundred Seventy Two Dollars and No Cents) representing a sum sufficient to secure payment of the

prevailing interest rate pursuant to 28 U.S.C. § 1961 on the amount of the LOCs for the period of this injunction through June 18, 2006, as damages which may be suffered by MIB if it is later shown that this injunctive relief was improvidently granted. Upon the presentation and acceptance by the Court of the undertaking required herein, Plaintiffs shall be entitled to the return of the $590,000 presently posted as security in connection with this Court's April 17, 2002 Temporary Restraining Order, plus any interest accumulated thereon. If the underlying litigation is not completed by June 11, 2006, and this court extends this Preliminary Injunction beyond June 18, 2006 as a consequence thereof, then MID may seek modification of this Order to increase the amount of the bond required herein.

**IT IS FURTHER ORDERED** that it is a condition of the Preliminary Injunction that Plaintiffs diligently prosecute their now pending appeal of Judge Castillo's February 27, 2003 decision. Following exhaustion of Plaintiffs' appellate rights concerning that decision and if that appeal is unsuccessful, Plaintiffs will then have thirty (30) days thereafter to commence an action in Bermuda to prosecute the claims asserted in their Illinois federal action. If Plaintiffs fail to do so, this Preliminary Injunction will be dissolved.

**IT IS FURTHER ORDERED** that the proceedings in this cause are stayed as respects Defendants Mutual Indemnity (Bermuda), Ltd. And Bank of America, N.A. pending further order of this Court.

Dated: June 18, 2003.

/s/_____
JOHN CORBETT O'MEARA
United States District Judge

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**No. CV 02-3150 GHK (Cwx)**

**[Filed April 22, 2003]**

| | |
|---|---|
| DIANE M. HENDRICKS and KENNETH A. HENDRICKS, Plaintiffs, | ) |
| v. | ) |
| BANK OF AMERICA, N.A., and MUTUAL INDEMNITY (BERMUDA), LTD., a Bermuda corporation, Defendants. | ) |

**PRELIMINARY INJUNCTION ORDER**

**THIS MATTER** having come before the Court for hearing at 9:30 a.m. on April 14, 2003 on its Order to Show Cause why a preliminary injunction should not be granted subsequent to this Court's Temporary Restraining Order entered April 18, 2002 at 2:25 p.m. and continued thereafter by stipulation of the parties:

**HAVING REVIEWED AND CONSIDERED** the following: Plaintiffs' Complaint for Injunctive Relief; Plaintiffs' Memorandum of Points and Authorities in Support of Their Ex Parte Application for Temporary Restraining Order and Preliminary Injunction; Defendant Mutual Indemnity (Bermuda), Ltd.'s ("MIB") Memorandum of Points and Authorities in Opposition to Application to Order to Show Cause (and related errata submission); Plaintiffs' Memorandum of Points and Authorities in Response thereto; MIB's and Plaintiffs' respective submissions concerning the February 27, 2003 ruling by Judge Castillo of the United States District Court for the Northern District of Illinois; and the Joint Brief and Supporting Joint Exhibits submitted by the parties in response to this Court's directives in its Order dated March 10, 2003; and having heard oral argument of the parties, for the reasons stated on the record at the hearing held before this Court on April 14, 2003, we hereby enter the following Preliminary Injunction pursuant to California Commercial Code §5109(b) and Fed. R. Civ. P. 65:

**IT IS ORDERED** that Defendant, Bank of America, N.A., its officers, employees, agents, servants, attorneys and all persons in active concert with it, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined from:

(a) Accepting, acting upon, facilitating or in any manner allowing any draw down on the Letter of Credit in the amount of $3,072,107.50 issued by Bank of America, N.A. (Reference Number 3035345) on February 28, 2001 and amended on March 2, 2001 ("LOC");

(b) Transferring, conveying, assigning, amending or otherwise hypothecating any interest in or to the LOC pending further order of this Court.

**IT IS FURTHER ORDERED** that this Preliminary Injunction shall remain in effect until the earlier of the following:

(1) Final resolution of the merits of the underlying claims between Plaintiffs and the Mutual Defendants in either the Illinois federal court or Bermuda; or

(2) April 14, 2006.

**IT IS FURTHER ORDERED** that this Preliminary Injunction is conditioned upon Plaintiffs' timely posting with the Clerk of this Court an undertaking in the form of a bond in the amount of One Hundred Fifteen Thousand Two Hundred Four Dollars and Three Cents ($115,204.03) representing a sum sufficient to secure payment of the prevailing interest rate pursuant to 28 U.S.C. §1961 on the amount of the LOC for the period of this injunction through April 14, 2006, as damages which may be suffered by MIB if it is later shown that this injunctive relief was improvidently granted. If the underlying litigation is not completed by April 14, 2006, and this Court extends this Preliminary Injunction beyond April 14, 2006 as a consequence thereof, then MIB may seek modification of this Order to increase the amount of the bond required herein.

**IT IS FURTHER ORDERED** that it is a condition of this Preliminary Injunction that Plaintiffs diligently prosecute their now pending appeal of Judge Castillo's February 27, 2003

decision. Following exhaustion of Plaintiffs' appellate rights concerning that decision and if that appeal is unsuccessful, Plaintiffs will then have thirty (30) days thereafter to commence an action in Bermuda to prosecute the claims asserted in their Illinois federal action. If Plaintiffs fail to do so, this Preliminary Injunction will be dissolved.

**IT IS FURTHER ORDERED** that the proceedings in this cause are stayed as respects Defendant, Mutual Indemnity (Bermuda), Ltd., pending further order of this Court.

Dated: 4/22, 2003.

/s/
GEORGE H. KING
United States District Judge

## APPENDIX F

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**No. 03-55754**

**[Amended May 24, 2005]**

DIANE M. HENDRICKS;
KENNETH A. HENDRICKS,
Plaintiffs-Appellees,

v.

BANK OF AMERICA, N.A.,
Defendant,

MUTUAL INDEMNITY (BERMUDA), LTD., a Bermuda corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-02-03150-GHK
George H. King, District Judge, Presiding.

Before: J. Clifford Wallace, John T. Noonan, and M. Margaret McKeown, Circuit Judges

## AMENDED OPINION

WALLACE, Senior Circuit Judge:

Mutual Indemnity (Bermuda), Ltd., the defendant in the trial court (Mutual), appeals from a district court order enjoining co-defendant Bank of America, N.A. (Bank) from honoring Mutual's efforts to draw down on a letter of credit (LOC) posted by Diane and Kenneth Hendricks, the trial court plaintiffs (the Hendricks). We have jurisdiction to review the district court's preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1), and we affirm.

### I.

The Hendricks own American Patriot Insurance Agency, Inc. (American Patriot), a company that specializes in providing insurance products to roofing contractors. In early 1997, the Hendricks established a commercial insurance program for workers compensation and other insurance coverages with underwriting assistance from Mutual Risk Management and its subsidiaries: Mutual, Legion Insurance Company, Commonwealth Risk Services, L.P., and Villanova Insurance Company (collectively, the Mutual Entities). Several contracts govern the relationship between American Patriot and the Mutual Entities, but only one is directly relevant here: a "shareholder agreement," which entitles the Hendricks to reap certain profits and income generated by the commercial insurance program and commits the Hendricks to indemnify Mutual for losses on the program. The shareholder agreement also requires the Hendricks to post irrevocable LOCs and maintain the LOCs for the duration of Mutual's outstanding or potential liability for program losses.

In April 2001, the Hendricks filed an action in the Northern District of Illinois "alleging fraud, misrepresentation, conspiracy, breach of contract, RICO violations and negligence arising out of" the Mutual Entities' alleged fraudulent mishandling of their underwriting and claims-handling practices from 1997 to 1999. *Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 248 F. Supp. 2d 779, 781 (N.D. Ill. 2003). The Mutual Entities moved to dismiss for lack of venue, citing the shareholder agreement's forum selection clause, which states: "This Agreement . . . shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this Agreement shall be resolved exclusively by the courts of Bermuda." The district court agreed that the forum selection clause precluded the Hendricks' Illinois action and granted the motion to dismiss. *Id.* at 783-86. On appeal, the Seventh Circuit affirmed. *See Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884 (7th Cir. 2004).

One day after filing their Illinois complaint, the Hendricks brought an action in the Central District of California seeking injunctive relief to prevent Mutual from drawing down on an LOC in the possession of the Bank. The California complaint listed both Mutual and the Bank as defendants and requested a preliminary injunction based on California Commercial Code section 5109(b), which provides that "if an applicant claims that . . . honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation." CAL. COM. CODE § 5109(b).

The district court reviewed the Hendricks' pleadings and promptly issued a temporary restraining order against Mutual, directing it to show cause why a preliminary injunction should

not be entered. After the Northern District of Illinois filed its decision in the Illinois action, Mutual invoked collateral estoppel and asked the district court to dissolve the temporary restraining order and deny the Hendricks' request for injunctive relief. Following oral argument, the district court determined that the Hendricks "had stated a claim for interim relief against the Bank of America as the issuer of the LOC . . . pursuant to . . . Section 5109." The district court reasoned that collateral estoppel did not prevent the Hendricks from seeking injunctive relief against the Bank, because the Bank was not a party in the Illinois action against the Mutual Entities. In addition, it concluded that Mutual was "not a necessary, much less an indispensable, party to" that action against the Bank. It therefore "stayed" the Hendricks' claims against Mutual and issued a "preliminary" injunction to remain in effect "until the earlier of the following: (1) final resolution of the merits of the underlying claims between Plaintiffs and the Mutual Defendants in either the Illinois federal court or Bermuda; or (2) April 14, 2006."

## II.

Mutual does not challenge the district court's decision to stay indefinitely the Hendricks' action against it individually. Instead, it seeks to appeal from the portion of the district court's order that grants preliminary injunctive relief against the co-defendant Bank. The Bank has chosen not to participate in Mutual's appeal since it does not assert an independent interest in the LOC. This raises an important threshold question for our consideration: whether Mutual, a party to the Hendricks' action and the LOC beneficiary, has standing to appeal from the district court's preliminary injunction order against the Bank.

We have held that a defendant may assert "standing to contest the grant of the preliminary injunction issued against . . . other defendants" under certain circumstances, "even though those defendants have not appealed." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 n.2 (9th Cir. 1984). To meet our standing requirements for appeal, a defendant must demonstrate that he or she was "a party at the time judgment was entered and [was] aggrieved by the decision being appealed." *Id.*; *see also In re Exxon Valdez*, 239 F.3d 985, 987 (9th Cir. 2001) (concluding that a litigant had standing to appeal because it was "a party to this case from the beginning" and "contends that it is aggrieved by the district court's order"). Mutual clearly satisfies these requirements because it was both a party of record when the district court entered its preliminary injunction and the intended beneficiary of the enjoined LOC. *See Lueker v. First Nat'l Bank of Boston (Guernsey) Ltd.*, 82 F.3d 334, 337 (10th Cir. 1996) (observing that an LOC beneficiary had standing to appeal from an injunction entered against a co-defendant bank under similar circumstances); *Andy Marine, Inc. v. Zidell, Inc.*, 812 F.2d 534 (9th Cir. 1987) (exercising jurisdiction over an LOC beneficiary's appeal from a district court order, which enjoined a bank from honoring the beneficiary's draft).

The Hendricks also contend that Mutual lacks standing to appeal because it steadfastly contested personal jurisdiction in the Central District of California, but they cite no authority which supports this argument. Were we to treat personal jurisdiction defenses under Federal Rule of Civil Procedure 12(b)(2) as waivers of appellate standing, we would essentially immunize district courts' personal jurisdiction determinations from appellate scrutiny--an untenable proposition, to be sure.

We recognize, of course, that a *nonparty* generally cannot simultaneously challenge personal jurisdiction and assert standing to appeal. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S. Ct. 586, 98 L. Ed. 2d 629 (1988) (per curiam). For this reason, an interested LOC beneficiary who "deliberately [chooses] to remain a nonparty" lacks standing to appeal from a district court order which permanently enjoined a bank from making payment on the LOC. *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1439-41 (9th Cir. 1987).

However, Mutual *was* a party to the district court proceedings and was aggrieved by the preliminary injunction. It therefore has standing to appeal the injunction. *See Goldie's Bookstore, Inc.*, 739 F.2d at 468 n.2. We hold, therefore, that Mutual has standing to appeal from the district court's preliminary injunction.

## III.

Mutual raises essentially two procedural challenges to the district court's preliminary injunction: improper venue and lack of personal jurisdiction over a necessary and indispensable party. *See* FED. R. CIV. P. 12(b)(3) (improper venue); FED. R. CIV. P. 19(a)-(b) (necessary and indispensable party).

### A.

Before advancing to the merits of Mutual's procedural challenges, we must decide whether these issues are amenable to appellate review at this stage. Under 28 U.S.C. § 1292(a)(1), we may exercise interlocutory appellate

jurisdiction over the district court's preliminary injunction and pendent jurisdiction over any "otherwise non-appealable ruling [that] is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before us on interlocutory appeal." *Meredith v. Oregon*, 321 F.3d 807, 813 (9th Cir. 2003) (*quoting Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)), *amended by* 326 F.3d 1030 (9th Cir. 2003). District court rulings are "inextricably intertwined" with a preliminary injunction when "the legal theories on which the issues advance [are] . . . so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or . . . resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Meredith*, 321 F.3d at 814, *quoting Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000). We also construe *Swint*'s "necessary to ensure meaningful review" language narrowly to "require[] much more than a tangential relationship to the decision properly before us on interlocutory appeal." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004).

The Hendricks contend that Mutual's personal jurisdiction and venue defenses are not "inextricably intertwined" with the district court's preliminary injunction. We need not decide here whether their assertion is correct, because we conclude that "review of [these two defenses] is necessary to ensure meaningful review of" the district court's preliminary injunction. *Swint*, 514 U.S. at 51.

In reaching this conclusion, we consider whether the issue calls into question the district court's "*authority to rule* on a party's motion for a preliminary injunction." *Meredith*, 321 F.3d at 816 (emphasis added). For example, we have recognized that it "is necessary" to decide subject matter

jurisdiction defenses "to ensure meaningful review of [a] district court's interlocutory rulings because if appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings." *Id.* (internal quotation marks omitted); *see also Wong v. United States*, 373 F.3d 952, 960-61 (9th Cir. 2004) (discussing pendent jurisdiction over subject matter jurisdiction issues). Similarly, we have invoked pendent jurisdiction under section 1292(a)(1) to decide whether a district court lacked "authority to rule on a party's motion for a preliminary injunction" because it was "required to abstain." *Meredith*, 321 F.3d at 816. On the other hand, we have declined to exercise pendent jurisdiction over rulings such as the availability of a *Bivens* remedy that were "not a logical predicate to the" issues properly raised on appeal and did not "implicate the very power of the district court to issue the rulings on appeal." *Wong*, 373 F.3d at 961. The common thread running throughout these decisions is our recognition that section 1292(a)(1) furnishes pendent jurisdiction over those questions that implicate "the very power the district court used to issue the rulings then under consideration." *Meredith*, 321 F.3d at 816 (internal brackets omitted), *quoting Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999).

From these principles, it follows that we may exercise pendent jurisdiction to review Mutual's personal jurisdiction and venue defenses under the particular circumstances of this interlocutory appeal. Like the various rulings discussed in *Meredith*, Mutual's procedural defenses bear on the district court's power to issue the injunction, because the court would lack authority to grant relief if (1) Mutual was a necessary and indispensable party and immune from personal jurisdiction in this forum, or (2) venue was improper because the forum-selection clause precluded preliminary injunctive relief outside Bermuda. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760

(1999) ("Personal jurisdiction . . . is an essential element of the jurisdiction of a district court, without which the court is powerless to proceed to an adjudication." (internal quotation marks and ellipsis omitted)).

We recognize, of course, that we need not consider Rule 12 and Rule 19 defenses in every case "to ensure meaningful review of" preliminary injunctions on interlocutory appeal. Had Mutual waived the privilege to assert these defenses, for instance, by failing to raise them "by motion" or "in a responsive pleading," we would lack pendent jurisdiction to review them on interlocutory appeal. Fed. R. Civ. P. 12(h); *see also Poulos*, 379 F.3d at 672 (declining to review a district court's exercise of personal jurisdiction because "the district court would have retained jurisdiction . . . regardless of whether it asserted personal jurisdiction over [a subgroup of] defendants"). In this case, however, Mutual did not waive its venue and personal jurisdiction defenses because it raised them in a timely manner in its first responsive pleading after securing several reasonable extensions of the filing deadline to facilitate settlement negotiations. *See* Fed. R. Civ. P. 12(h). Because Mutual's procedural defenses were properly raised, and because they attacked the district court's authority to grant relief, the district court had to consider the defenses as "a logical predicate to" its preliminary injunction order. *Wong*, 373 F.3d at 961. We therefore exercise pendent jurisdiction over Mutual's two procedural defenses pursuant to section 1292(a)(1). *Cf. In re Diet Drugs*, 282 F.3d 220, 230 n.5 (3d Cir. 2002) ("We have pendent appellate jurisdiction over the issue of personal jurisdiction, because, in this case, that issue bears upon the propriety of the preliminary injunction." (internal quotation marks and brackets omitted)).

**B.**

Mutual contends that the district court should have dismissed the instant action pursuant to Federal Rule of Civil Procedure 19(b) because Mutual was not subject to personal jurisdiction in the Central District of California. Rule 19 provides that a court must dismiss a civil action if it lacks personal jurisdiction over any "necessary" and "indispensable" party. FED. R. CIV. P. 19(a)-(b); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985) (reviewing this analysis). A party is "necessary" if "(1) in [its] absence complete relief cannot be afforded among those already parties, or (2) [it] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations." FED. R. CIV. P. 19(a). Whether a party is "indispensable" is an equitable determination to be decided based on a variety of factors, including:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). If Mutual is not a "necessary" and "indispensable" party to the Hendricks' request for injunctive

relief against the Bank, its argument for dismissal based on personal jurisdiction fails.

Rule 19's necessary and indispensable party "inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002). As such, we review the district court's resolution of this inquiry for an abuse of discretion. *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

The district court delivered "complete relief" to the Hendricks without Mutual's direct participation in the suit by enjoining the Bank from honoring a draw on the LOC pending the outcome of litigation between the Hendricks and Mutual in another forum. FED. R. CIV. P. 19(a)(1). Moreover, the preliminary injunction does not "as a practical matter impair or impede [Mutual's] ability to protect [its] interest" in the LOC or "leave any of the persons already parties subject to a risk of incurring . . . inconsistent obligations" in another forum. *See* FED. R. CIV. P. 19(a)(2). Instead, it merely preserves the asset pending a final judgment on the merits in Bermuda. Thus, "as a practical matter," the preliminary injunction does not "impede [Mutual's] ability to protect that" asset.[1]

Having rejected Mutual's challenge to the district court's "necessary" party analysis, we need not decide whether "in equity and good conscience" Mutual qualifies as an

---

[1] There was no abuse of discretion in the district court's conclusion that Mutual is not a "necessary" party to the Hendricks' action for injunctive relief against the Bank.

indispensable party under Rule 19(b). *See United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1381 n.18a (9th Cir. 1984). Since Mutual has not demonstrated that the district court lacked personal jurisdiction over a "necessary" party to the Hendricks' action, the district court could grant injunctive relief against the Bank without deciding whether it had personal jurisdiction over Mutual individually.

## C.

Mutual argues next that the shareholder agreement's forum selection clause required the district court to dismiss the Hendricks' action for improper venue. *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (holding that a motion to dismiss based on a forum-selection clause should be treated "as a Rule 12(b)(3) motion to dismiss for improper venue."). There is some ambiguity in the record as to whether the district court actually reached Mutual's improper venue argument prior to issuing its preliminary injunction. After oral argument, the court stated initially that it would "not at this point decide . . . whether the forum selection clause is in fact applicable [in] this case." Later on, however, the court returned to the venue question and reasoned that "to the extent that [Mutual] may be making any argument with respect to the forum selection clause or collateral estoppel, neither of those arguments prevent us from issuing an injunction under [section] 5109 against [the Bank] because we are making different determinations of issues against a different party." That is, the district court held that the forum selection clause did not preclude venue, insofar as it interpreted the clause not to apply to the Hendricks' section 5109 claim against the Bank, which is a nonparty to the Shareholder Agreement. We need not decide whether this interpretation was correct, because, as explained

later, we hold that the clause does not apply for different reasons. We review de novo both the district court's application of collateral estoppel, *see Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003), and its interpretation of the forum selection clause. *See N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1036 n.3 (9th Cir. 1995).

According to Mutual, the Seventh Circuit's decision in *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884 (7th Cir. 2004), compels the conclusion that venue was improper. That court held that the shareholder agreement's forum selection clause bars courts outside Bermuda from adjudicating the Hendricks' substantive claims for fraud, breach of contract, and other claims. 364 F.3d at 888-90. This determination is dispositive here, Mutual maintains, because "collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997).

By definition, collateral estoppel does not foreclose our independent consideration of a district court's venue determination unless "the issue at stake" in the instant litigation is "identical to" an issue "alleged" and "actually litigated in the prior litigation." *Id.* The venue issues under consideration here do not meet this test. In the Illinois action, the Hendricks sought a final judgment on the merits of their dispute with the Mutual Entities, so the Seventh Circuit had no occasion to consider the precise venue question posed in this case: whether the shareholder agreement's forum selection clause prevents courts outside Bermuda from issuing temporary injunctions to secure assets pending a final judgment on the merits in Bermuda. Collateral estoppel might

preclude the Hendricks from bringing a common law fraud or misrepresentation action in the Central District of California. However, that is different from the Hendricks seeking temporary injunctive relief in this forum to preserve an asset, which was not an issue "actually adjudicated in the" Illinois case. *Id.*

Turning to the merits of Mutual's improper venue defense, we presume that the shareholder agreement's forum selection clause is prima facie valid and enforceable unless the Hendricks can show that enforcement would be "'unreasonable' under the circumstances." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); *see also Arguenta*, 87 F.3d at 325 ("Although *Bremen* is an admiralty case, its standard has been widely applied to forum selection clauses in general."). To the extent the forum selection clause applies here, the Hendricks have the burden "'to show that trial in the contractual forum would be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court.'" *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 515 (9th Cir. 1988), *quoting Bremen*, 407 U.S. at 18.

The question presented here is significantly different, however, from the typical forum selection clause case. The Hendricks do not dispute the forum selection clause's validity, nor do they contest the Seventh Circuit's determination that the clause is enforceable where applicable; instead, they contend that the clause's *scope* does not extend to actions designed to preserve assets pending a judgment on the merits in the contractually selected forum. Whether the Hendricks must secure a preliminary injunction in Bermuda to preserve this asset or may claim protection under the California statute is a question of first impression in our circuit. However, our reasoning in an analogous admiralty case, *Polar Shipping,*

*Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), is instructive:

> It is clear from The Bremen and its Ninth Circuit progeny that where there is an enforceable foreign court selection clause, dismissal of the action is generally appropriate. However neither the Supreme Court in The Bremen, nor this court, has addressed the issue of whether . . . the district court, instead of unconstitutionally dismissing the action, may ensure the availability of security pending a determination of the merits in the contractually selected forum. . . .
>
> The enforceability of foreign court selection clauses is a matter of judicially-created contract law. The question, then, is, what does the contract permit or require? Does it permit attachment in another forum, and maintenance of the attachment pending decision in the contractually selected forum? . . .
>
> It is clear . . . that the parties intended that they would litigate the merits of any dispute . . . in [another] forum. There is, however, no indication . . . that the parties intended to limit proceedings to obtain prejudgment security to that forum. . . .
>
> We hold that in an admiralty action, absent express intent to the contrary, a forum selection clause providing that all disputes under the charter will be determined by a selected foreign court neither precludes a plaintiff from commencing an action in the district court to obtain security by maritime

> attachment, nor prohibits the district court from ensuring the availability of security adequate to satisfy a favorable judgment by the selected forum.

*Id.* at 631-33 (internal citations omitted).

Although we cautiously confined *Polar Shipping*'s holding to admiralty actions, there is no compelling reason why the analysis developed in that case should not apply to temporary injunctions issued under section 5109(b). In both *Polar Shipping* and the instant case, "the enforceability of foreign court selection clauses is a matter of judicially-created contract law," meaning that "the intent of the parties governs the extent to which [the district court] may exercise its jurisdiction" to preserve assets pending a judgment in the contractually designated forum. *Polar Shipping*, 680 F.2d at 632; *see also Bremen*, 407 U.S. at 12 (rejecting the argument that forum selection clauses "oust" a district court of jurisdiction, and describing the proper inquiry as "whether [the] court should have exercised its jurisdiction to do more than give effect to the legitimate expectation of the parties").

In this case, the forum selection clause manifests the parties' consensus to litigate the *merits* of "any dispute concerning [the Shareholder] Agreement" in Bermuda. But the case before us is not about the agreement itself or its validity. On the contrary, there is "no indication from either the [agreement] or the record, that [the parties] intended to limit proceedings to obtain prejudgment security to that forum. If the parties had so intended they could easily have worded [the forum selection clause] to so provide. They did not do so." *Polar Shipping*, 680 F.2d at 632; *see also Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (observing that in granting a preliminary injunction "we do not review the underlying merits of the case").

Since Mutual has not shown from the language of the shareholders agreement or presented any evidence that the parties intended to limit actions outside Bermuda for prejudgment injunctive relief, the district court did not err by concluding that the Central District of California was an appropriate venue for the Hendricks' action under section 5109(b) to preserve the LOC. We hold that the district court did not err in denying Mutual's motion to dismiss the Hendricks' action for improper venue.

## IV.

Mutual did not address the merits of the injunction in its pleadings filed in district court because of counsel's fear that challenging the fraud allegations would have submitted Mutual to its jurisdiction. At the oral argument, Mutual did make passing reference to the merits. Although Mutual arguably waived its challenge to the merits, as the question is a close one, we address the merits of Mutual's appeal on this point.

With these procedural hurdles behind us, we turn at last to the merits of the district court's preliminary injunction. "Our review is limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). We must affirm the injunction "unless the district court (1) abused its discretion or (2) based its discretion on an erroneous legal standard or on clearly erroneous findings of fact." *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

### A.

Mutual argues that the district court's preliminary injunction was inappropriate because the Hendricks' action

does not anticipate a final judgment on the merits in the Central District of California. Pursuant to Federal Rule of Civil Procedure 64, "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held." Thus, we look to California law to determine whether the district court could grant a preliminary injunction even though final resolution of the underlying fraud claim would not occur in that court.

California law expressly allows "a court of competent jurisdiction [to] temporarily . . . enjoin" a bank from honoring a letter of credit "or grant similar relief" if the plaintiff claims that honor would "facilitate a material fraud" by the beneficiary on the plaintiff and certain requirements are satisfied. CAL. COM. CODE § 5109(b). The statute contains no requirement that final resolution of the merits must occur in the same court that grants the "temporary" or "similar" relief. Although the district court used the word "preliminary" in describing the injunction, section 5109(b) permits "temporary" injunctions and also allows a court to "grant similar relief." The district court could just as well have entered a "temporary" injunction rather than a "preliminary" injunction. We conclude that the power to do so is not determined by which of the two designations the district court uses. In the case before us, it is obviously a form of relief expressly authorized by the state statute. The district court had authority to grant the interim relief pursuant to section 5109.

**B.**

The final issue presented for our review is the district court's application of the discrete legal standards for injunctive relief. The district court granted the Hendricks' complaint for injunctive relief because it found "there [was a] sufficient showing of likelihood of success on the merits of [their] claim of material fraud" and that there was "certainly a possibility of irreparable injury inasmuch as once released, the money is likely . . . to be dissipated in light of [Mutual's] questionable financial circumstances." We review this determination for an abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc).

**1.**

Because the district court issued its order pursuant to section 5109, we evaluate Mutual's likelihood of success according to section 5109's standard:

> If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily . . . enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that: . . . on the basis of the information submitted to the court, the applicant is *more likely than not to succeed* under its claim of . . . material fraud . . . .

CAL. COM. CODE § 5109(b) (emphasis supplied). Put differently, this provision authorizes the district court to grant injunctive relief only if the record shows that allowing Mutual

to draw down on the LOC "more likely than not" would facilitate a material fraud by Mutual.

The district court concluded that the Hendricks established a sufficient probability of success on the merits, because they established a prima facie case of fraud, which Mutual did not challenge in its opposition to the court's order to show cause. The court cited the uncontroverted affidavit of Eric Bossard, a former Legion Insurance Company executive, which revealed that the Mutual Entities systematically under-reserved claims and misrepresented the extent of the Hendricks' liability for program losses. Whether the Hendricks originally *posted* their LOC in reliance on these fraudulent representations does not render the fraud immaterial, as Mutual alleges, because the Hendricks submitted affidavit testimony that they *maintained* the LOC with the Bank--and thereby exposed themselves to even greater losses--in reliance on the Mutual Entities' representations. As the district court recognized, allowing Mutual to draw on the LOC could "facilitate a material fraud" by aggravating the Hendricks' loss if Mutual turns out to be insolvent and, hence, judgment-proof. CAL. COM. CODE § 5109(b).

Mutual contends that the Bossard affidavit only establishes misrepresentations by employees of Mutual Entities other than Mutual, the LOC beneficiary. This distinction between Mutual and the other Mutual Entities is irrelevant for present purposes, because the Bossard affidavit also states that the Mutual Entities were "acting as one in the marketing and implementation of" the Hendricks' insurance program; fraudulent statements by these employees were part of a coordinated fraud scheme in which Mutual played a key role. Mutual's intimate involvement in this scheme is evidenced by its President's signature on the letter agreement which

formalized the parties' reinsurance arrangement, and its acceptance of payment for the "phantom" reinsurance. Given this unopposed evidence of Mutual's participation in the Mutual Entities' fraud scheme, the district court did not abuse its discretion by concluding the "likelihood of success" requirement was satisfied.

2.

Section 5109(b) does not incorporate the common law irreparable injury requirement. However, some federal and state courts have applied this standard to suits for injunctive relief under U.C.C. section 5-109. *See, e.g., Interco, Inc. v. First Nat'l Bank of Boston*, 560 F.2d 480 (1st Cir. 1977) (requiring a showing of "irreparable harm and inadequacy of legal remedies" for injunctive relief under Massachusetts General Laws chapter 106, section 5-109 (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)); *In re Commco Tech., L.L.C.*, 258 B.R. 63, 64-65 (Bankr. D. Conn. 2001) (explaining that a plaintiff must make a showing of irreparable harm to qualify for a preliminary injunction under Minnesota Statute section 336.5-109 (2000)).

We need not decide whether there is an irreparable injury requirement for issuance of an injunction because the Hendricks contend that their risk of irreparable harm is "virtually self-evident," and their argument is persuasive. They assert that Mutual and the other Mutual Entities are "in serious financial straits" and would likely dissipate the LOC funds before the Hendricks could obtain a judgment on the merits in Bermuda. The district court agreed with this assessment of Mutual's financial circumstances.

The Hendricks submitted several documents from which the district court could reasonably conclude that Mutual's tenuous financial circumstances would imperil the Hendricks' ability to recoup assets drawn from the LOC. Two of these documents are particularly important: (1) an affidavit of William Taylor, a Pennsylvania state deputy insurance commissioner overseeing the rehabilitation of two of the Mutual Entities; and (2) an unpublished disposition dated November 25, 2002 from the Commonwealth Court of Pennsylvania relating to the rehabilitation proceedings. These records are to the effect that as recently as December 23, 2002--just four months before the district court entered its preliminary injunction--Mutual "conceded in its public statements and its filings that it [was] insolvent." Taylor's affidavit specifically describes a "letter . . . sent by David Ezekiel on behalf of [Mutual] 'to all Scheme Creditors,'" which "stated that 'the Company has suffered losses over the past 18-24 months which have resulted in the Company becoming insolvent.'" In its findings of fact, the Commonwealth Court of Pennsylvania found that if a particular agreement was not enforced, Mutual might face "an uncertain prospect of whether [it could] honor [its] contractual obligations to pay dividends" and, if such payments could not be made, it "may face involuntary insolvency proceedings." Although the Pennsylvania court enforced that agreement, the district court could reasonably conclude that Mutual remained in a precarious financial position even after enforcement of the agreement. Mutual did not submit any evidence to demonstrate that its financial circumstances have improved since December 2002. We hold, therefore, that the district court did not abuse its discretion by concluding that the Hendricks would face a significant threat of irreparable injury if a preliminary injunction did not issue to prevent the Bank from honoring Mutual's draw. *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) ("[A] district

court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant . . . .").

In a supplemental paper submitted after oral argument pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Mutual contended that a recent unpublished decision of the Sixth Circuit arising out of related litigation "supports Mutual Indemnity's argument in this court that the district court's injunction should be reversed." That decision, *Hendricks v. Comerica Bank*, 122 Fed. Appx. 820, 2004 WL 2940879 (6th Cir. 2004), reversed an injunction granted by the Eastern District of Michigan preventing a bank from honoring Mutual's draws against letters of credit obtained by the Hendricks, because the Hendricks had "failed as a matter of law to show irreparable harm." 122 Fed. Appx. 820, [WL] at *1. The Sixth Circuit reasoned that "other courts have denied injunctions in cases in which it was unlikely that any foreign court could hear the underlying claim," and that "the chance that Mutual Indemnity is or will become bankrupt and will not be able to satisfy a judgment obtained against it presents less threat of irreparable harm than the chance that there will not even be a proceeding available in which to obtain that judgment." 122 Fed. Appx. 820, [WL] at *5. In other words, the Sixth Circuit held that a showing of a beneficiary's insolvency is insufficient as a matter of law to obtain an injunction preventing a bank from honoring the beneficiary's draw on an international letter of credit.

We need not and do not decide whether to adopt the Sixth Circuit's holding. Mutual did not argue in this court that evidence of its insolvency could not establish irreparable injury; rather, Mutual argued that "injunctive relief is unwarranted when the plaintiff has . . . not demonstrated that

the defendants cannot pay a judgment that might be entered on the plaintiff's underlying claims," and that "there is *no* evidence . . . that [Mutual] is or [is] about to be insolvent." That is, instead of arguing that it was irrelevant whether or not Mutual was insolvent, Mutual contended that the Hendricks simply had made no such showing. Since Mutual did not argue that a showing of insolvency could not establish the requisite irreparable harm, we decline to consider that argument now. *See Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) ("We will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief."). In addition, we also do not consider whether the Sixth Circuit's decision is binding here as a matter of collateral estoppel, law of the case, or any other doctrine, because Mutual has made no such argument.

## V.

As Mutual has not shown that the district court "abused its discretion" or "based its discretion on an erroneous legal standard or on clearly erroneous findings of fact," *Satava*, 323 F.3d at 810, we affirm the district court's preliminary injunction.

AFFIRMED.

## APPENDIX G

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**No. 03-55754**

**[ Filed February 25, 2005]**

DIANE M. HENDRICKS;
KENNETH A. HENDRICKS,
Plaintiffs-Appellees,

v.

BANK OF AMERICA, N.A.,
Defendant, and

MUTUAL INDEMNITY (BERMUDA), LTD., a Bermuda corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-02-03150-GHK
George H. King, District Judge, Presiding

## OPINION

WALLACE, Senior Circuit Judge

Mutual Indemnity (Bermuda), Ltd., the defendant in the trial court (Mutual), appeals from a district court order enjoining co-defendant Bank of America, N.A. (Bank) from honoring Mutual's efforts to draw down on a letter of credit (LOC) posted by Diane and Kenneth Hendricks, the trial court plaintiffs (the Hendricks). We have jurisdiction to review the district court's preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1), and we affirm.

### I.

The Hendricks own American Patriot Insurance Agency, Inc. (American Patriot), a company that specializes in providing insurance products to roofing contractors. In early 1997, the Hendricks established a commercial insurance program for workers compensation and other insurance coverages with underwriting assistance from Mutual Risk Management and its subsidiaries: Mutual, Legion Insurance Company, Commonwealth Risk Services, L.P., and Villanova Insurance Company (collectively, the Mutual Entities). Several contracts govern the relationship between American Patriot and the Mutual Entities, but only one is directly relevant here: a "shareholder agreement," which entitles the Hendricks to reap certain profits and income generated by the commercial insurance program and commits the Hendricks to indemnify Mutual for losses on the program. The shareholder agreement also requires the Hendricks to post irrevocable LOCs and maintain the LOCs for the duration of Mutual's outstanding or potential liability for program losses.

In April 2001, the Hendricks filed an action in the Northern District of Illinois "alleging fraud, misrepresentation, conspiracy, breach of contract, RICO violations and negligence arising out of" the Mutual Entities' alleged fraudulent mishandling of their underwriting and claims-handling practices from 1997 to 1999. *Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 248 F. Supp. 2d 779, 781 (N.D. Ill. 2003). The Mutual Entities moved to dismiss for lack of venue, citing the shareholder agreement's forum selection clause, which states: "This Agreement . . . shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this Agreement shall be resolved exclusively by the courts of Bermuda." The district court agreed that the forum selection clause precluded the Hendricks' Illinois action and granted the motion to dismiss. *Id.* at 783-86. On appeal, the Seventh Circuit affirmed. *See Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884 (7th Cir. 2004).

One day after filing their Illinois complaint, the Hendricks brought an action in the Central District of California seeking injunctive relief to prevent Mutual from drawing down on an LOC in the possession of the Bank. The California complaint listed both Mutual and the Bank as defendants and requested a preliminary injunction based on California Commercial Code section 5109(b), which provides that "if an applicant claims that . . . honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation." CAL. COM. CODE § 5109(b).

The district court reviewed the Hendricks' pleadings and promptly issued a temporary restraining order against Mutual, directing it to show cause why a preliminary injunction should

not be entered. After the Northern District of Illinois filed its decision in the Illinois action, Mutual invoked collateral estoppel and asked the district court to dissolve the temporary restraining order and deny the Hendricks' request for injunctive relief. Following oral argument, the district court determined that the Hendricks "had stated a claim for interim relief against the Bank of America as the issuer of the LOC . . . pursuant to . . . Section 5109." The district court reasoned that collateral estoppel did not prevent the Hendricks from seeking injunctive relief against the Bank, because the Bank was not a party in the Illinois action against the Mutual Entities. In addition, it concluded that Mutual was "not a necessary, much less an indispensable, party to" that action against the Bank. It therefore "stayed" the Hendricks' claims against Mutual and issued a "preliminary" injunction to remain in effect "until the earlier of the following: (1) final resolution of the merits of the underlying claims between Plaintiffs and the Mutual Defendants in either the Illinois federal court or Bermuda; or (2) April 14, 2006."

## II.

Mutual does not challenge the district court's decision to stay indefinitely the Hendricks' action against it individually. Instead, it seeks to appeal from the portion of the district court's order that grants preliminary injunctive relief against the co-defendant Bank. The Bank has chosen not to participate in Mutual's appeal since it does not assert an independent interest in the LOC. This raises an important threshold question for our consideration: whether Mutual, a party to the Hendricks' action and the LOC beneficiary, has standing to appeal from the district court's preliminary injunction order against the Bank.

We have held that a defendant may assert "standing to contest the grant of the preliminary injunction issued against . . . other defendants" under certain circumstances, "even though those defendants have not appealed." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 n.2 (9th Cir. 1984). To meet our standing requirements for appeal, a defendant must demonstrate that he or she was "a party at the time judgment was entered and [was] aggrieved by the decision being appealed." *Id.*; *see also In re Exxon Valdez*, 239 F.3d 985, 987 (9th Cir. 2001) (concluding that a litigant had standing to appeal because it was "a party to this case from the beginning" and "contends that it is aggrieved by the district court's order"). Mutual clearly satisfies these requirements because it was both a party of record when the district court entered its preliminary injunction and the intended beneficiary of the enjoined LOC. *See Lueker v. First Nat'l Bank of Boston (Guernsey) Ltd.*, 82 F.3d 334, 337 (10th Cir. 1996) (observing that an LOC beneficiary had standing to appeal from an injunction entered against a co-defendant bank under similar circumstances); *Andy Marine, Inc. v. Zidell, Inc.*, 812 F.2d 534 (9th Cir. 1987) (exercising jurisdiction over an LOC beneficiary's appeal from a district court order, which enjoined a bank from honoring the beneficiary's draft).

The Hendricks also contend that Mutual lacks standing to appeal because it steadfastly contested personal jurisdiction in the Central District of California, but they cite no authority which supports this argument. Were we to treat personal jurisdiction defenses under Federal Rule of Civil Procedure 12(b)(2) as waivers of appellate standing, we would essentially immunize district courts' personal jurisdiction determinations from appellate scrutiny--an untenable proposition, to be sure.

We recognize, of course, that a *nonparty* generally cannot simultaneously challenge personal jurisdiction and assert standing to appeal. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304, 98 L. Ed. 2d 629, 108 S. Ct. 586 (1988) (per curiam). For this reason, an interested LOC beneficiary who "deliberately [chooses] to remain a nonparty" lacks standing to appeal from a district court order which permanently enjoined a bank from making payment on the LOC. *Citibank Int'l v. Collier-Traino, Inc.*, 809 F.2d 1438, 1439-41 (9th Cir. 1987).

However, Mutual *was* a party to the district court proceedings and was aggrieved by the preliminary injunction. It therefore has standing to appeal the injunction. *See Goldie's Bookstore, Inc.*, 739 F.2d at 468 n.2. We hold, therefore, that Mutual has standing to appeal from the district court's preliminary injunction.

## III.

Mutual raises essentially two procedural challenges to the district court's preliminary injunction: improper venue and lack of personal jurisdiction over a necessary and indispensable party. *See* FED. R. CIV. P. 12(b)(3) (improper venue); FED. R. CIV. P. 19(a)-(b) (necessary and indispensable party).

### A.

Before advancing to the merits of Mutual's procedural challenges, we must decide whether these issues are amenable to appellate review at this stage. Under 28 U.S.C. § 1292(a)(1), we may exercise interlocutory appellate

jurisdiction over the district court's preliminary injunction and pendent jurisdiction over any "otherwise non-appealable ruling [that] is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before us on interlocutory appeal." *Meredith v. Oregon*, 321 F.3d 807, 813 (9th Cir. 2003) (*quoting Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)), *amended by* 326 F.3d 1030 (9th Cir. 2003). District court rulings are "inextricably intertwined" with a preliminary injunction when "the legal theories on which the issues advance [are] . . . so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or . . . resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Meredith*, 321 F.3d at 814, *quoting Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000). We also construe *Swint*'s "necessary to ensure meaningful review" language narrowly to "require[] much more than a tangential relationship to the decision properly before us on interlocutory appeal." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004).

The Hendricks contend that Mutual's personal jurisdiction and venue defenses are not "inextricably intertwined" with the district court's preliminary injunction. We need not decide here whether their assertion is correct, because we conclude that "review of [these two defenses] is necessary to ensure meaningful review of" the district court's preliminary injunction. *Swint*, 514 U.S. at 51.

In reaching this conclusion, we consider whether the issue calls into question the district court's "*authority to rule* on a party's motion for a preliminary injunction." *Meredith*, 321 F.3d at 816 (emphasis added). For example, we have recognized that it "is necessary" to decide subject matter

jurisdiction defenses "to ensure meaningful review of [a] district court's interlocutory rulings because if appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings." *Id.* (internal quotation marks omitted); *see also Wong v. United States*, 373 F.3d 952, 960-61 (9th Cir. 2004) (discussing pendent jurisdiction over subject matter jurisdiction issues). Similarly, we have invoked pendent jurisdiction under section 1292(a)(1) to decide whether a district court lacked "authority to rule on a party's motion for a preliminary injunction" because it was "required to abstain." *Meredith*, 321 F.3d at 816. On the other hand, we have declined to exercise pendent jurisdiction over rulings such as the availability of a *Bivens* remedy that were "not a logical predicate to the" issues properly raised on appeal and did not "implicate the very power of the district court to issue the rulings on appeal." *Wong*, 373 F.3d at 961. The common thread running throughout these decisions is our recognition that section 1292(a)(1) furnishes pendent jurisdiction over those questions that implicate "the very power the district court used to issue the rulings then under consideration." *Meredith*, 321 F.3d at 816 (internal brackets omitted), *quoting Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999).

From these principles, it follows that we may exercise pendent jurisdiction to review Mutual's personal jurisdiction and venue defenses under the particular circumstances of this interlocutory appeal. Like the various rulings discussed in *Meredith*, Mutual's procedural defenses bear on the district court's power to issue the injunction, because the court would lack authority to grant relief if (1) Mutual was a necessary and indispensable party and immune from personal jurisdiction in this forum, or (2) venue was improper because the forum-selection clause precluded preliminary injunctive relief outside Bermuda. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760

(1999) ("Personal jurisdiction . . . is an essential element of the jurisdiction of a district court, without which the court is powerless to proceed to an adjudication." (internal quotation marks and ellipsis omitted)).

We recognize, of course, that we need not consider Rule 12 and Rule 19 defenses in every case "to ensure meaningful review of" preliminary injunctions on interlocutory appeal. Had Mutual waived the privilege to assert these defenses, for instance, by failing to raise them "by motion" or "in a responsive pleading," we would lack pendent jurisdiction to review them on interlocutory appeal. FED. R. CIV. P. 12(h); *see also Poulos*, 379 F.3d at 672 (declining to review a district court's exercise of personal jurisdiction because "the district court would have retained jurisdiction . . . regardless of whether it asserted personal jurisdiction over [a subgroup of] defendants"). In this case, however, Mutual did not waive its venue and personal jurisdiction defenses because it raised them in a timely manner in its first responsive pleading after securing several reasonable extensions of the filing deadline to facilitate settlement negotiations. *See* Fed. R. Civ. P. 12(h). Because Mutual's procedural defenses were properly raised, and because they attacked the district court's authority to grant relief, the district court had to consider the defenses as "a logical predicate to" its preliminary injunction order. *Wong*, 373 F.3d at 961. We therefore exercise pendent jurisdiction over Mutual's two procedural defenses pursuant to section 1292(a)(1). *Cf. In re Diet Drugs*, 282 F.3d 220, 230 n.5 (3d Cir. 2002) ("We have pendent appellate jurisdiction over the issue of personal jurisdiction, because, in this case, that issue bears upon the propriety of the preliminary injunction." (internal quotation marks and brackets omitted)).

**B.**

Mutual contends that the district court should have dismissed the instant action pursuant to Federal Rule of Civil Procedure 19(b) because Mutual was not subject to personal jurisdiction in the Central District of California. Rule 19 provides that a court must dismiss a civil action if it lacks personal jurisdiction over any "necessary" and "indispensable" party. FED. R. CIV. P. 19(a)-(b); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985) (reviewing this analysis). A party is "necessary" if "(1) in [its] absence complete relief cannot be afforded among those already parties, or (2) [it] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations." FED. R. CIV. P. 19(a). Whether a party is "indispensable" is an equitable determination to be decided based on a variety of factors, including:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). If Mutual is not a "necessary" and "indispensable" party to the Hendricks' request for injunctive

relief against the Bank, its argument for dismissal based on personal jurisdiction fails.

Rule 19's necessary and indispensable party "inquiry is a practical, fact-specific one, designed to avoid the harsh results of rigid application." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1154 (9th Cir. 2002). As such, we review the district court's resolution of this inquiry for an abuse of discretion. *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

The district court delivered "complete relief" to the Hendricks without Mutual's direct participation in the suit by enjoining the Bank from honoring a draw on the LOC pending the outcome of litigation between the Hendricks and Mutual in another forum. FED. R. CIV. P. 19(a)(1). Moreover, the preliminary injunction does not "as a practical matter impair or impede [Mutual's] ability to protect [its] interest" in the LOC or "leave any of the persons already parties subject to a risk of incurring . . . inconsistent obligations" in another forum. *See* FED. R. CIV. P. 19(a)(2). Instead, it merely preserves the asset pending a final judgment on the merits in Bermuda. Thus, "as a practical matter," the preliminary injunction does not "impede [Mutual's] ability to protect that" asset.[1]

Having rejected Mutual's challenge to the district court's "necessary" party analysis, we need not decide whether "in equity and good conscience" Mutual qualifies as an indispensable party under Rule 19(b). *See United Food &*

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[1] There was no abuse of discretion in the district court's conclusion that Mutual is not a "necessary" party to the Hendricks' action for injunctive relief against the Bank.

*Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1381 n.18a (9th Cir. 1984). Since Mutual has not demonstrated that the district court lacked personal jurisdiction over a "necessary" party to the Hendricks' action, the district court could grant injunctive relief against the Bank without deciding whether it had personal jurisdiction over Mutual individually.

## C.

Mutual argues next that the shareholder agreement's forum selection clause required the district court to dismiss the Hendricks' action for improper venue. *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (holding that a motion to dismiss based on a forum-selection clause should be treated "as a Rule 12(b)(3) motion to dismiss for improper venue."). There is some ambiguity in the record as to whether the district court actually reached Mutual's improper venue argument prior to issuing its preliminary injunction. After oral argument, the court stated initially that it would "not at this point decide . . . whether the forum selection clause is in fact applicable [in] this case." Later on, however, the court returned to the venue question and reasoned that "to the extent that [Mutual] may be making any argument with respect to the forum selection clause or collateral estoppel, neither of those arguments prevent us from issuing an injunction under [section] 5109 against [the Bank] because we are making different determinations of issues against a different party." That is, the district court held that the forum selection clause did not preclude venue, insofar as it interpreted the clause not to apply to the Hendricks' section 5109 claim against the Bank, which is a nonparty to the Shareholder Agreement. We need not decide whether this interpretation was correct, because, as explained later, we hold that the clause does not apply for different

reasons. We review the district court's decision not to enforce the forum selection clause for an abuse of discretion. *See Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002).

According to Mutual, the Seventh Circuit's decision in *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884 (7th Cir. 2004), compels the conclusion that venue was improper. That court held that the shareholder agreement's forum selection clause bars courts outside Bermuda from adjudicating the Hendricks' substantive claims for fraud, breach of contract, and other claims. 364 F.3d at 888-90. This determination is dispositive here, Mutual maintains, because "collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997).

By definition, collateral estoppel does not foreclose our independent consideration of a district court's venue determination unless "the issue at stake" in the instant litigation is "identical to" an issue "alleged" and "actually litigated in the prior litigation." *Id.* The venue issues under consideration here do not meet this test. In the Illinois action, the Hendricks sought a final judgment on the merits of their dispute with the Mutual Entities, so the Seventh Circuit had no occasion to consider the precise venue question posed in this case: whether the shareholder agreement's forum selection clause prevents courts outside Bermuda from issuing temporary injunctions to secure assets pending a final judgment on the merits in Bermuda. Collateral estoppel might preclude the Hendricks from bringing a common law fraud or misrepresentation action in the Central District of California. However, that is different from the Hendricks seeking

temporary injunctive relief in this forum to preserve an asset, which was not an issue "actually adjudicated in the" Illinois case. *Id.*

Turning to the merits of Mutual's improper venue defense, we presume that the shareholder agreement's forum selection clause is prima facie valid and enforceable unless the Hendricks can show that enforcement would be " 'unreasonable' under the circumstances." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); *see also Arguenta*, 87 F.3d at 325 ("Although *Bremen* is an admiralty case, its standard has been widely applied to forum selection clauses in general."). To the extent the forum selection clause applies here, the Hendricks have the burden "'to show that trial in the contractual forum would be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court.'" *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 515 (9th Cir. 1988), *quoting Bremen*, 407 U.S. at 18.

The question presented here is significantly different, however, from the typical forum selection clause case. The Hendricks do not dispute the forum selection clause's validity, nor do they contest the Seventh Circuit's determination that the clause is enforceable where applicable; instead, they contend that the clause's *scope* does not extend to actions designed to preserve assets pending a judgment on the merits in the contractually selected forum. Whether the Hendricks must secure a preliminary injunction in Bermuda to preserve this asset or may claim protection under the California statute is a question of first impression in our circuit. However, our reasoning in an analogous admiralty case, *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), is instructive:

> It is clear from The Bremen and its Ninth Circuit progeny that where there is an enforceable foreign court selection clause, dismissal of the action is generally appropriate. However neither the Supreme Court in The Bremen, nor this court, has addressed the issue of whether . . . the district court, instead of unconstitutionally dismissing the action, may ensure the availability of security pending a determination of the merits in the contractually selected forum. . . .
>
> The enforceability of foreign court selection clauses is a matter of judicially-created contract law. The question, then, is, what does the contract permit or require? Does it permit attachment in another forum, and maintenance of the attachment pending decision in the contractually selected forum? . . .
>
> It is clear . . . that the parties intended that they would litigate the merits of any dispute . . . in [another] forum. There is, however, no indication . . . that the parties intended to limit proceedings to obtain prejudgment security to that forum. . . .
>
> We hold that in an admiralty action, absent express intent to the contrary, a forum selection clause providing that all disputes under the charter will be determined by a selected foreign court neither precludes a plaintiff from commencing an action in the district court to obtain security by maritime attachment, nor prohibits the district court from ensuring the availability of security adequate to satisfy a favorable judgment by the selected forum.

*Id.* at 631-33 (internal citations omitted).

Although we cautiously confined *Polar Shipping*'s holding to admiralty actions, there is no compelling reason why the analysis developed in that case should not apply to temporary injunctions issued under section 5109(b). In both *Polar Shipping* and the instant case, "the enforceability of foreign court selection clauses is a matter of judicially-created contract law," meaning that "the intent of the parties governs the extent to which [the district court] may exercise its jurisdiction" to preserve assets pending a judgment in the contractually designated forum. *Polar Shipping*, 680 F.2d at 632; *see also Bremen*, 407 U.S. at 12 (rejecting the argument that forum selection clauses "oust" a district court of jurisdiction, and describing the proper inquiry as "whether [the] court should have exercised its jurisdiction to do more than give effect to the legitimate expectation of the parties").

In this case, the forum selection clause manifests the parties' consensus to litigate the *merits* of "any dispute concerning [the Shareholder] Agreement" in Bermuda. But the case before us is not about the agreement itself or its validity. On the contrary, there is "no indication from either the [agreement] or the record, that [the parties] intended to limit proceedings to obtain prejudgment security to that forum. If the parties had so intended they could easily have worded [the forum selection clause] to so provide. They did not do so." *Polar Shipping*, 680 F.2d at 632; *see also Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995) (observing that in granting a preliminary injunction "we do not review the underlying merits of the case").

Since Mutual has not shown from the language of the shareholders agreement or presented any evidence that the parties intended to limit actions outside Bermuda for prejudgment injunctive relief, the district court did not abuse its discretion by concluding that the Central District of

California was an appropriate venue for the Hendricks' action under section 5109(b) to preserve the LOC. We hold that the district court did not abuse its discretion in denying Mutual's motion to dismiss the Hendricks' action for improper venue.

## IV.

Mutual did not address the merits of the injunction in its pleadings filed in district court because of counsel's fear that challenging the fraud allegations would have submitted Mutual to its jurisdiction. At the oral argument, Mutual did make passing reference to the merits. Although Mutual arguably waived its challenge to the merits, as the question is a close one, we address the merits of Mutual's appeal on this point.

With these procedural hurdles behind us, we turn at last to the merits of the district court's preliminary injunction. "Our review is limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). We must affirm the injunction "unless the district court (1) abused its discretion or (2) based its discretion on an erroneous legal standard or on clearly erroneous findings of fact." *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003).

### A.

Mutual argues that the district court's preliminary injunction was inappropriate because the Hendricks' action does not anticipate a final judgment on the merits in the Central District of California. Pursuant to Federal Rule of Civil Procedure 64, "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided

by the law of the state in which the district court is held." Thus, we look to California law to determine whether the district court could grant a preliminary injunction even though final resolution of the underlying fraud claim would not occur in that court.

California law expressly allows "a court of competent jurisdiction [to] temporarily . . . enjoin" a bank from honoring a letter of credit "or grant similar relief" if the plaintiff claims that honor would "facilitate a material fraud" by the beneficiary on the plaintiff and certain requirements are satisfied. CAL. COM. CODE § 5109(b). The statute contains no requirement that final resolution of the merits must occur in the same court that grants the "temporary" or "similar" relief. Although the district court used the word "preliminary" in describing the injunction, section 5109(b) permits "temporary" injunctions and also allows a court to "grant similar relief." The district court could just as well have entered a "temporary" injunction rather than a "preliminary" injunction. We conclude that the power to do so is not determined by which of the two designations the district court uses. In the case before us, it is obviously a form of relief expressly authorized by the state statute. The district court had authority to grant the interim relief pursuant to section 5109.

**B.**

The final issue presented for our review is the district court's application of the discrete l gal standards for injunctive relief. The district court granted the Hendricks' complaint for injunctive relief because it found "there [was a] sufficient showing of likelihood of success on the merits of [their] claim of material fraud" and that there was "certainly a possibility of irreparable injury inasmuch as once released, the money is likely . . . to be dissipated in light of [Mutual's]

questionable financial circumstances." We review this determination for an abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc).

**1.**

Because the district court issued its order pursuant to section 5109, we evaluate Mutual's likelihood of success according to section 5109's standard:

> If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily . . . enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that: . . . on the basis of the information submitted to the court, the applicant is *more likely than not to succeed* under its claim of . . . material fraud . . . .

CAL. COM. CODE § 5109(b) (emphasis supplied). Put differently, this provision authorizes the district court to grant injunctive relief only if the record shows that allowing Mutual to draw down on the LOC "more likely than not" would facilitate a material fraud by Mutual.

The district court concluded that the Hendricks established a sufficient probability of success on the merits, because they established a prima facie case of fraud, which Mutual did not challenge in its opposition to the court's order to show cause. The court cited the uncontroverted affidavit of Eric Bossard, a former Legion Insurance Company executive, which revealed that the Mutual Entities systematically under-

reserved claims and misrepresented the extent of the Hendricks' liability for program losses. Whether the Hendricks originally *posted* their LOC in reliance on these fraudulent representations does not render the fraud immaterial, as Mutual alleges, because the Hendricks submitted affidavit testimony that they *maintained* the LOC with the Bank--and thereby exposed themselves to even greater losses--in reliance on the Mutual Entities' representations. As the district court recognized, allowing Mutual to draw on the LOC could "facilitate a material fraud" by aggravating the Hendricks' loss if Mutual turns out to be insolvent and, hence, judgment-proof. CAL. COM. CODE § 5109(b).

Mutual contends that the Bossard affidavit only establishes misrepresentations by employees of Mutual Entities other than Mutual, the LOC beneficiary. This distinction between Mutual and the other Mutual Entities is irrelevant for present purposes, because the Bossard affidavit also states that the Mutual Entities were "acting as one in the marketing and implementation of" the Hendricks' insurance program; fraudulent statements by these employees were part of a coordinated fraud scheme in which Mutual played a key role. Mutual's intimate involvement in this scheme is evidenced by its President's signature on the letter agreement which formalized the parties' reinsurance arrangement, and its acceptance of payment for the "phantom" reinsurance. Given this unopposed evidence of Mutual's participation in the Mutual Entities' fraud scheme, the district court did not abuse its discretion by concluding the "likelihood of success" requirement was satisfied.

2.

Section 5109(b) does not incorporate the common law irreparable injury requirement. However, some federal and state courts have applied this standard to suits for injunctive relief under U.C.C. section 5-109. *See, e.g.*, *Interco, Inc. v. First Nat'l Bank of Boston*, 560 F.2d 480 (1st Cir. 1977) (requiring a showing of "irreparable harm and inadequacy of legal remedies" for injunctive relief under Massachusetts General Laws chapter 106, section 5-109 (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)); *In re Commco Tech., L.L.C.*, 258 B.R. 63, 64-65 (Bankr. D. Conn. 2001) (explaining that a plaintiff must make a showing of irreparable harm to qualify for a preliminary injunction under Minnesota Statute section 336.5-109 (2000)).

We need not decide whether there is an irreparable injury requirement for issuance of an injunction because the Hendricks contend that their risk of irreparable harm is "virtually self-evident," and their argument is persuasive. They assert that Mutual and the other Mutual Entities are "in serious financial straits" and would likely dissipate the LOC funds before the Hendricks could obtain a judgment on the merits in Bermuda. The district court agreed with this assessment of Mutual's financial circumstances.

The Hendricks submitted several documents from which the district court could reasonably conclude that Mutual's tenuous financial circumstances would imperil the Hendricks' ability to recoup assets drawn from the LOC. Two of these documents are particularly important: (1) an affidavit of William Taylor, a Pennsylvania state deputy insurance commissioner overseeing the rehabilitation of two of the Mutual Entities; and (2) an unpublished disposition dated

November 25, 2002 from the Commonwealth Court of Pennsylvania relating to the rehabilitation proceedings. These records are to the effect that as recently as December 23, 2002--just four months before the district court entered its preliminary injunction--Mutual "conceded in its public statements and its filings that it [was] insolvent." Taylor's affidavit specifically describes a "letter . . . sent by David Ezekiel on behalf of [Mutual] 'to all Scheme Creditors,'" which "stated that 'the Company has suffered losses over the past 18-24 months which have resulted in the Company becoming insolvent.'" In its findings of fact, the Commonwealth Court of Pennsylvania found there was a possibility that Mutual faced "an uncertain prospect of whether [it could] honor [its] contractual obligations to pay dividends" and, if such payments could not be made, it "may face involuntary insolvency proceedings." Mutual did not submit any evidence to demonstrate that its financial circumstances have improved since December 2002. We hold, therefore, that the district court did not abuse its discretion by concluding that the Hendricks would face a significant threat of irreparable injury if a preliminary injunction did not issue to prevent the Bank from honoring Mutual's draw. *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) ("[A] district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant . . . .").

In a supplemental paper submitted after oral argument pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Mutual contended that a recent unpublished decision of the Sixth Circuit arising out of related litigation "supports Mutual Indemnity's argument in this court that the district court's injunction should be reversed." That decision, *Hendricks v. Comerica Bank*, 2004 U.S. App. LEXIS 26606,

No. 03-1952, 2004 WL 2940879 (6th Cir. Dec. 20, 2004), reversed an injunction granted by the Eastern District of Michigan preventing a bank from honoring Mutual's draws against letters of credit obtained by the Hendricks, because the Hendricks had "failed as a matter of law to show irreparable harm." *Id.* at *1. The Sixth Circuit reasoned that "other courts have denied injunctions in cases in which it was unlikely that any foreign court could hear the underlying claim," and that "the chance that Mutual Indemnity is or will become bankrupt and will not be able to satisfy a judgment obtained against it presents less threat of irreparable harm than the chance that there will not even be a proceeding available in which to obtain that judgment." *Id.* at *5. In other words, the Sixth Circuit held that a showing of a beneficiary's insolvency is insufficient as a matter of law to obtain an injunction preventing a bank from honoring the beneficiary's draw on an international letter of credit.

We need not and do not decide whether to adopt the Sixth Circuit's holding. Mutual did not argue in this court that evidence of its insolvency could not establish irreparable injury; rather, Mutual argued that "injunctive relief is unwarranted when the plaintiff has . . . not demonstrated that the defendants cannot pay a judgment that might be entered on the plaintiff's underlying claims," and that "there is *no* evidence . . . that [Mutual] is or [is] about to be insolvent." That is, instead of arguing that it was irrelevant whether or not Mutual was insolvent, Mutual contended that the Hendricks simply had made no such showing. Since Mutual did not argue that a showing of insolvency could not establish the requisite irreparable harm, we decline to consider that argument now. *See Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) ("We will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening

brief."). In addition, we also do not consider whether the Sixth Circuit's decision is binding here as a mater of collateral estoppel, law of the case, or any other doctrine, because Mutual has made no such argument.

## V.

As Mutual has not shown that the district court "abused its discretion" or "based its discretion on an erroneous legal standard or on clearly erroneous findings of fact," *Satava*, 323 F.3d at 810, we affirm the district court's preliminary injunction.

AFFIRMED.

(2)

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No. 04-1699

# In the Supreme Court of the United States

DIANE M. HENDRICKS AND KENNETH A. HENDRICKS,

*Petitioners,*

v.

MUTUAL INDEMNITY (BERMUDA), LTD.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether this Court should review the Sixth Circuit's application of well-established preliminary injunction standards, under which the court of appeals properly found that petitioners had failed to demonstrate irreparable harm because they alleged only monetary injury and introduced "evidence" of insolvency that related not to respondent Mutual Indemnity (Bermuda) Ltd.—the beneficiary of letters of credit sought to be enjoined—but to other entities.

## RULES 29.6 AND 14.1 STATEMENT

Respondent Mutual Indemnity (Bermuda), Ltd. is a wholly-owned subsidiary of its parent corporation Mutual Holdings (Bermuda), Ltd., and their ultimate parent is Mutual Risk Management, Ltd. No publicly held corporation owns 10% or more of Mutual Indemnity (Bermuda), Ltd.'s stock..

Petitioners are Diane M. Hendricks and Kenneth A. Hendricks.

Comerica Bank and Bank of America, N.A. were named as defendants in the district court but did not appeal its ruling.

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### STATEMENT

This is one of a trio of cases petitioners filed piecemeal in federal courts around the country despite a forum-selection clause requiring that any suits must be brought in Bermuda and decided under Bermuda law. Petitioners designed and sold a commercial insurance program for which respondent Mutual Indemnity (Bermuda), Ltd. ("MIB") acted as a reinsurer. Petitioners agreed to indemnify MIB for program losses and secured that obligation with irrevocable letters of credit ("LOCs"). As losses mounted, petitioners disputed the claims amounts for which they were responsible and, ignoring the contract's forum-selection clause, filed three lawsuits against MIB and other entities in the United States: one in the Northern District of Illinois complaining of fraud, and the other two in federal district courts in Michigan and California seeking to enjoin payment from the various LOCs because of that alleged "fraud." The Illinois suit was dismissed because of the Bermuda forum-selection clause. *American Patriot Ins. Agency* v. *Mutual Risk Management*, 364 F.3d 884 (7th Cir. 2004).

The question in this case is whether petitioners sufficiently demonstrated the irreparable injury required to enjoin payment on three of the LOCs, when they claimed that without the injunction they would allegedly suffer only monetary injury. The Sixth Circuit concluded they had not. Because the Ninth Circuit decided to the contrary with respect to another LOC in California, petitioners seek review in this Court. The principal conflict asserted—that the Sixth and Ninth Circuits "reached directly opposite conclusions" in "parallel" cases (Pet. i, 1)—is purely of petitioners' own making. Petitioners could have requested injunctive relief in Illinois with respect to all of the LOCs. Or they could have sought injunctive relief in Bermuda, the contractually agreed-upon forum for resolving all disputes between the parties. Instead, they opted for duplicative Ameri-

can litigation, apparently on the theory that several bites at the apple—each forbidden by the contract's forum-selection clause—were better than one.

Petitioners now seek yet another unwarranted opportunity for relief in this Court. The different decisions from the courts of appeals regarding petitioners' entitlement to injunctive relief were not, as petitioners say, due to any disagreement over the law. Both courts made clear that their rulings on irreparable injury depended on their particular view of the *facts*, with the Ninth Circuit expressly disclaiming any need to "decide whether to adopt the Sixth Circuit's holding." Pet. App. 47a. The decisions themselves thus repudiate any claim that this case involves a genuine *legal* conflict worthy of the Court's attention. Indeed, as is evident from the Sixth Circuit's opinion, the only issue considered below was whether irreparable injury was shown on the particular facts in this record. That fact-driven question is ill-suited for a grant of certiorari, especially since the preliminary injunction, by its own terms, will expire in mid-June 2006 at the latest.

### A. The Insurance Program and Petitioners' Three U.S. Lawsuits.

In 1997, petitioners devised and established a program to sell insurance to roofing contractors. Legion Insurance issued the policies; MIB was a reinsurer. Under the parties' contracts, petitioners must indemnify MIB for payments made as Legion's reinsurer. Pet. App. 4a. To secure that obligation, a Shareholder Agreement required petitioners to post an "irrevocable letter of credit" to be kept "in force" as long as MIB has potential liability for program losses. 6th Cir. App. 43-44 ("C.A. App."); Pet. App. 4a-5a. The Shareholder Agreement also required that "any dispute concerning this Agreement shall be resolved exclusively by the courts of Bermuda" and "shall be exclusively governed by * * * the laws of Bermuda." C.A. App. 46; Pet. App. 6a.

As losses accumulated after the first three program years, petitioners contend they became concerned about their prospective liability. Pet. App. 5a; C.A. App. 15-16. Petitioners met with officers at Legion and a company involved in marketing the program, Commonwealth Risk Services—not with anyone at MIB as their petition wrongly asserts (at 10)—who supposedly informed petitioners that they were responsible for losses above MIB's reinsurance limit even though such liability actually fell to Legion. According to one former Legion employee, he was instructed to tell petitioners that additional reinsurance could be obtained to cover such losses. Pet. App. 5a-6a.[1]

Subsequently, the parties entered an amended agreement whereby petitioners were to indemnify MIB for its payments as Legion's reinsurer as well as for the additional coverage MIB was to purchase on petitioners' behalf. That amendment applied only to the fourth—and last—program year (2000). C.A. App. 70-71; Pet. App. 6a.

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[1] Contrary to petitioners' implication, the Sixth Circuit did not determine that their exposure for the losses was "non-existent" or that there was a "larger scheme to defraud" them but merely recited the account of this former Legion employee, Eric Bossard (incorrectly described by petitioners as an "MIB executive" who "bl[e]w the whistle"). Pet. 10; see Pet. App. 5a-6a. Because the court vacated the preliminary injunction due to the absence of a showing of irreparable harm, it did not have to (and did not) express any opinion as to the purported fraud. Pet. App. 6a, 9a, 13a; see *infra* pp. 6-7. That "fraud," moreover, is not "uncontested" or "undisputed" for "purposes of this proceeding." Pet. 9, 10. Among MIB's additional arguments for reversal before the Sixth Circuit were that MIB was entitled to draw on the LOCs regardless of whether petitioners had bought any additional reinsurance, and that petitioners had failed to establish that MIB had committed any fraud because the alleged misrepresentations were made by other entities. MIB 6th Cir. Br. 53-54; MIB 6th Cir. Reply Br. 25-26.